

What to do about unprotected strikes at Nkomati Mine?

by

Nkosana Christian Phakathi

Student Number: PHKNKO003

Submitted in partial fulfilment of the requirements for the degree of

Master of Philosophy: LABOUR LAW

in the

FACULTY OF LAW

UNIVERSITY OF CAPETOWN

Supervisor: Dr. Emma Fergus

February 2020

Word count: 24852

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

Research dissertation presented for the approval of Senate in partial fulfilment of the requirements for the *M.Phil. in Labour Law* in approved courses and a minor dissertation.

I hereby declare that I have read and understood the regulations governing the submission of *M.Phil. in Labour Law* dissertations, including those relating to length and plagiarism, as contained in the rules of this university, and that this dissertation conforms to those regulations.

Signed by candidate

10 February 2020

Signature and date.

Acknowledgements

First and foremost, I would like to thank God Almighty for the strength to complete this dissertation.

To my late father, Luvalo Phakathi and my grandfather Ntethe Phakathi, your love, wisdom and strength continue to guide and protect me. Thank you for instilling in me the belief that I can do great things.

To my late father in law, Butiki Mahlong. Thank you for your unwavering support and encouragement.

To my children Siphosihle and Siphokazi. Thank you for bearing with me through the most difficult days, you will never know how much your love, patience, and understanding inspires me. This dissertation is dedicated to you.

To my mother Makazi Phakathi. Thank you for your support and prayers.

To my employer at Nkomati Mine, Liana Thomas. Thank you for your unwavering support and patience.

Lastly to my supervisor Dr Emma Fergus I appreciate all the assistance, kindness and valuable comments. Your knowledge and deep insight into the topic was valuable. Thank you.

Chapter 1: INTRODUCTION AND BACKGROUND	6
1.1 Introduction	6
1.2 Background	10
1.3 The facts	12
1.4 The arbitration hearing	13
1.4.1 Destruction of property	13
1.4.2 Releasing of chemicals	16
1.4.3 Intimidation	18
1.5 Problem statement and purpose	21
 Chapter 2: THE LEGAL FRAMEWORK	 23
2.1 Introduction	23
2.2 International Standards	24
2.3 The Constitution of the Republic of South Africa, Act 108 of 1996	25
2.4 The Labour Relations Act 66 of 1995	27
2.4.1 Consequences of a protected strike	35
2.4.2 Consequences of an unprotected strike	37
2.5 The Code of Good Practice: Collective Bargaining, Industrial Action and Picketing	38
2.6 Picketing	40
2.7 Nkomati's Grievance Procedure	43
2.8 Conclusion	43

Chapter 3: REMEDIES	45
3.1 Introduction	45
3.2 Remedies for unprotected strikes and unlawful activities during strikes	47
3.2.1 Interdict	47
3.2.1.1 Contempt of Court	49
3.2.2 Compensation	52
3.2.3 Damages	54
3.2.4 Disciplinary Action	56
3.2.4.1 Disciplinary for participating in an unprotected strike	56
3.2.4.2 Pre-dismissal hearing	58
3.2.4.3 Dismissal for participating in an unprotected strike	58
3.2.4.4 Dismissal for misconduct	63
3.2.4.4.1 Intimidation	63
3.2.4.4.2 Destruction of property	64
3.2.4.4.3 Assault	66
3.2.4.4.4 Collective Misconduct	68
3.2.4.4.4.1 Common purpose	68
3.2.4.4.4.2 Derivative Misconduct	69
3.2.4.4.5 Applying Collective Misconduct principles to Nkomati	72
3.3 Conclusion	73
 Chapter 4: CONCLUSION AND RECOMMENDATION	 73
4.1 Conclusion	73
4.2 Recommendations	76

Chapter 1

INTRODUCTION AND BACKGROUND

1.1 Introduction

Strikes are a vital element of collective bargaining, particularly because the relationship between the employer and employee is an imbalanced one.¹ Importantly, strikes should comply with the procedural requirements as stipulated in the Labour Relations Act 66 of 1995 (the LRA) to be afforded protection.² The protection is given to strikers, against interdicts, delictual claims by the employer and against claims for breach of contract.³ Strikes that fails to comply with Chapter IV of the LRA and are prohibited in terms of section 65 of the LRA are unprotected.⁴

If workers are not allowed to strike they cannot exercise their rights enshrined in the Constitution.⁵ It is common knowledge that strike actions have a negative impact: during a strike the employees lose their earnings due to their absence from work⁶ the principle of 'no work no pay' usually applies, the employers also lose business.⁷ Strike action is never undertaken without a loss to both sides.⁸ During a strike action not only the striking

¹ Mbona, MD A critical analysis of the law on strikes in South Africa (LLM dissertation, University of KwaZulu-Natal, 2014) 6. See also *Black Allied Workers Union v Prestige Hotels CC t/a Blue Waters Hotel* 1993 14 ILJ 963 (LAC) paras 972A-D.

² Section 67(1) of the LRA.

³ Tenza, EM *The liability of trade unions for conduct of their members during industrial action* (LLD thesis University of South Africa, 2016) 122. See also section 67(2) of the LRA.

⁴ Section 67 of the LRA.

⁵ Section 23 of the Constitution of the Republic of South Africa, Act 108 of 1996 (the Constitution).

⁶ Selala J The Right to Strike and the Future of Collective Bargaining in South Africa: An Exploratory Analysis International Journal of Social Sciences 2014(3) 121. https://www.iises.net/download/Soubory/IJOSS/V3N5-special/pp115-126_ijossV3N5.pdf accessed on 12/05/2019.

⁷ Tenza op cit (n3)21.

⁸ Bendix Sonia, Industrial Relations in South Africa 5ed (2010)658.

employees but also the non-strikers are affected.⁹ In practice, however, most employers will pay their non-striking employees full remuneration with the aim to put pressure on the striking employees to stop their strike action and return to work.¹⁰

From a business perspective, temporarily closing down a business whilst employees are on strike is disastrous for everyone concerned but sometimes necessary to avoid sabotage and damaging of machinery.¹¹ Employees withhold their services, with the hope to bring production to a halt, causing the employer to lose business and sustain overhead expenses without the prospect of income to compel the employer to accede to a demand.¹² While the constitutional right to strike is important in the collective bargaining process, it is also important to point out the inconsiderate exercise of this right which sometimes includes violence, intimidation and the destruction of property.¹³ This and other unlawful acts have remained a major cause of strained employment relationships in South Africa.¹⁴

The right to strike is constitutionally protected in South Africa.¹⁵ Regrettably, incidents of violence and intimidation have frequently characterized industrial actions in employment disputes in South Africa.¹⁶ The majority of violent strikes are unprotected, various forms of intimidations, assaults and killings are prevalent, among striking employees against non-striking employees.¹⁷ On many occasions these unlawful acts are committed in the picketing line outside the employer's premises.¹⁸ In some cases the picketing line turns into a war zone between striking employees, non-striking employees and clients of the business.¹⁹

⁹ Selala op cit (n6)121.

¹⁰ Selala op cit (n6)121.

¹¹ Selala op cit (n6)121.

¹² *VNR Steel (Pty) Ltd v NUMSA (1995) 16 ILJ 1483 (LAC)* at para 49.

¹³ Selala op cit (n6)121.

¹⁴ Selala op cit (n6)121.

¹⁵ Section 23 of the Constitution.

¹⁶ Selala op cit (n6)121.

¹⁷ Selala op cit (n6)121.

¹⁸ Selala op cit (n6)121.

¹⁹ Selala op cit (n6)121.

The court, in the case of *Food & Allied Workers Union on behalf of Kapesi v Premier Foods Ltd t/a Blue Ribbon Salt River*, expressed its views on the issue as follows:

‘It is certainly not acceptable to force an employer through violent and criminal conduct to accede to their demands. This type of vigilante conduct not only seriously undermines the values of our Constitution, but only serves to seriously and irreparably undermine future relations between strikers and their employers. Such conduct further completely negates the rights of non-strikers to continue working, to dignity, to safety and security and privacy and peace of mind.’²⁰

‘The right to strike is not without consequences in situations where unlawful acts are committed.’²¹ ‘Common law principles provide that an employer may have a delictual claim against a trade union or the employees for damages caused during a strike action.’²² However, the current dispensation changed the common law position.²³ Also, the current dispensation does not accommodate unlawful acts during strikes which amounts to criminal conduct.²⁴ In the matter between *Tsogo Sun Casinos (Pty) Ltd t/a Monte casino v Future of South African Workers’ Union and Others*, the court had this to say with regards to unlawful conduct:

‘This court will always intervene to protect both the right to strike, and the right to peaceful picketing. This is the court’s mandate, conferred by the Constitution and the LRA. But the exercise of the right to strike is sullied and ultimately eclipsed when those who purport to exercise it engage in acts of gratuitous violence in order to achieve their ends. When the tyranny of the mob displaces the peaceful exercise of economic pressure as the means

²⁰ *Food & Allied Workers Union on behalf of Kapesi v Premier Foods Ltd t/a Blue Ribbon Salt River* 2012 33 ILJ 1779 (LAC) paras 4-5.

²¹ Gcume, OT Violence during industrial action: a critical analysis of recent case law (masters of business law dissertation, University of KwaZulu-Natal, 2018) 49.

²² Tom, PY A trade union’s liability for damages caused during a strike: A critical evaluation of the Labour Relations Act and recent judgments (Masters of Business Law dissertation, University of KwaZulu-Natal, 2014) 3. https://researchspace.ukzn.ac.za/bitstream/handle/10413/12361/Tom_Pumla_Yvette_2014.pdf? Accessed on 04/10/2019.

²³ Mohale T, A critical study of the legal framework regulating strikes and strike violence in South Africa (LLM dissertation, University of KwaZulu-Natal, 2017) 20.

²⁴ *National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd* 2016 37 ILJ 476 (LC) at para 30.

to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy a protected status.²⁵

The LRA does not expressly provide that a strike will lose its protection if misconduct takes place.²⁶ However, the Tsogo Sun Casinos (Pty) Ltd decision above, suggests that a strike may lose its protection in instances where unlawful conduct takes place.²⁷

In terms of section 67(8) of the LRA the employer or third party has the right to institute civil and criminal liability against any person involved in the strike or any act in furtherance of a strike, if that act is an offence.²⁸ Therefore Nkomati or any employer whose property is vandalized as a result of the intentional actions of strikers could recover this loss on the grounds that such action constitutes a criminal offence.²⁹ The use of unlawful conduct to achieve industrial aims cannot be protected.³⁰ Thus a person cannot be granted immunity from the consequences of illegitimate acts.³¹ Claiming delictual and contractual damages is permitted where the conduct of striking employees results in harm and damage.³²

Section 68 of the LRA also provides for a claim of compensation and grant of an interdict when the strike is unprotected.³³ An unprotected strike is a strike by employees without having followed the requirements for a protected strike provided for in terms of section 64 of the LRA or the strike is prohibited in terms of section 65 of the LRA.³⁴ The Labour Court will have exclusive jurisdiction to grant an interdict and order the payment of just and equitable compensation for any loss attributable to the strike in this regard.³⁵

²⁵ *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union* 2012 33 ILJ 998 (LC) at para 13.

²⁶ Rycroft, A 'What Can Be Done about Strike-Related Violence?' (2014) 30 *IJCLLR (International Journal of Comparative Labour Law and Industrial Relations)* (2)199. https://www.upf.edu/documents/3298481/3410076/2013-LLRNConf_Rycroft.pdf. Accessed on 31/08/2019.

²⁷ Mohale op cit (n23)13.

²⁸ The LRA.

²⁹ du Toit et al. *Labour Relations Law: A Comprehensive Guide* 6ed (2015)355.

³⁰ du Toit et al op cit (n29)355.

³¹ du Toit et al op cit (n29)355.

³² Tom op cit (n22)10.

³³ The LRA.

³⁴ Mbona op cit (n1)20.

³⁵ du Toit et al op cit (n29)358.

Strikes permit employees to compel the employer to accede to their demands and therefore strikes are vital for collective bargaining.³⁶ However, as earlier mentioned strikes should comply with the requirements outlined in the LRA to enjoy protection. Regrettably employees or trade unions ignore these requirements and participate in unprotected strikes regardless. The following section will deal with the background of this dissertation focusing on the unprotected strikes using Nkomati events as an example.

1.2 Background

Unprotected strikes have over the years remained a problem at Nkomati and is a highly charged issue for both employees and Nkomati management.³⁷ In all matters of employee relations at Nkomati, it has always stood above other matters as one issue which contributes to the poor relationship quality between employees and management.³⁸ Unprotected strikes are not an integral part of the collective bargaining process and they place Nkomati in a difficult situation.³⁹ Put simply, for production to be optimum and sustained, unprotected strikes would indeed not contribute positively to Nkomati.⁴⁰

A key feature of these strikes arises from the employees' awareness about the possible sanction for this type of misconduct that is: a final written warning valid for 12 months. Employees thus develop a propensity of embarking on unprotected strikes once the valid warning elapses. For instance on 20 August 2014, 10 February 2017 and 23 April 2018 employees embarked on unprotected strikes. On all these occasions' unprotected strikes were related to short term incentive bonus payments. The employees developed a propensity to strike, to coerce Nkomati to pay bonuses despite not qualifying for these bonuses.

Generally speaking, Nkomati employees are allowed to express their dissatisfaction with management through internal processes that exist at Nkomati, such as a grievance

³⁶ du Toit et al op cit (n29)333.

³⁷ Mawasha MB, An analysis of legal implications for participating in an unprotected strike (LLM dissertation, University of South Africa, 2013)1.

³⁸ Mawasha op cit (37)1.

³⁹ Mawasha op cit (37)1.

⁴⁰ Mawasha op cit (37)1.

procedure.⁴¹ This does not always bring desired outcomes.⁴² Most of Nkomati employees have trade union representatives who negotiate with the employer on their behalf, however, the end result is sometimes not accepted by members;⁴³ parties fail to agree on what the members demand and what Nkomati puts on the negotiating table.⁴⁴ On many occasions, disputes over wages and terms of employment, benefits, unfair treatment, insulting treatment by superiors and so forth, may lead to employees embarking on collective action in the form of a strike.⁴⁵ Unprotected strike action can also take the form of what is generally known as a wildcat strike; a sudden unauthorized stoppage of work without any warning to management.⁴⁶

This research analyzes one particular strike at Nkomati, which took place on 23 April 2018 and that was marred with violence and intimidation. The facts of this strike are covered in this introductory section below. Using Nkomati as an example, the author considers ways to reduce violent unprotected strikes in analogous circumstances and to remedy the consequences thereof for those affected by them in the remainder of the research. This research therefore asks and seeks to answer these questions:

- i. What is an unprotected strike and what are the legal implications of participating in such a strike?
- ii. What legal mechanisms can be used to deal with unprotected strikes?
- iii. How should misconduct during strikes be dealt with?
- iv. Does Schedule 8 to the LRA, the Code of Good Practice: dismissal, offer meaningful ways to curb unprotected strikes and unlawful conduct?

Finally, the analysis of the consequences of unprotected strikes assists the study to determine methods through which proactive approaches can be developed in order to minimize or deter unprotected strikes and unlawful conduct during strikes with the

⁴¹ <https://www.wylie.co.za/newsroom/unprotected-strikes-trevor-mchunu-employment-law/> Accessed on 09/04/2019.

⁴² Mchunu op cit (n41)1.

⁴³ Mchunu op cit (n41)1.

⁴⁴ Mchunu op cit (n41)1.

⁴⁵ Mchunu op cit (n41)1. See also Bendix op cit (n8)653.

⁴⁶ Mawasha op cit (n37)8.

objective of improving relations between employees and Nkomati.⁴⁷ The study recommends pragmatic suggestions to both employees and Nkomati management to harmoniously resolve their disputes and grievances.

1.3 The facts

On Monday 23 April 2018, approximately 150 Nkomati employees embarked on an unprotected strike. During this strike buildings were damaged and set alight, vehicles were set alight, tyres were burnt on the road surface and employees were intimidated to participate in the unprotected strike. Nkomati incurred approximately a R7 million loss due to the strike. Managers and supervisors were therefore requested to view video footage to identify employees who committed other forms of misconduct during the unprotected strike. The author is mindful that participation in the unprotected strike is also a misconduct. During this identification process 14 employees were identified. Only 11 were found guilty and dismissed for Destruction of company property, intimidation and contravention of health and safety policies. In addition, criminal charges were levelled against these employees. The rest of the strikers were issued with a final written warning valid for 12 months for their participation in an unprotected strike.

The question that needs to be raised is why employees embarked on unprotected strikes while their consequences were so far reaching for both employees and Nkomati.⁴⁸ Strike action generally takes place as a last resort exercised by employees with the aim of achieving a specific objective and as such it is regarded as a deadlock-breaking mechanism.⁴⁹ It is a tool or weapon that is used by a trade union or employees to put pressure on the employer to accede to a particular demand of mutual interest.⁵⁰

It is an accepted phenomenon that every action has consequences, either positive or negative' as we have seen from above that Nkomati had incurred costs due to the

⁴⁷ Mawasha op cit (n37)3.

⁴⁸ Mawasha op cit (n37)1.

⁴⁹ Mawasha op cit (n37)1.

⁵⁰ Mawasha op cit (n37)1.

unprotected strike and employees lost their jobs and may have criminal records due to other misconduct committed during the unprotected strike.⁵¹

The aforementioned incident at Nkomati happened on 23 April 2018 and the disciplinary hearing was held with all 14 employees collectively on 14 June 2018 and finalized on 10 July 2018. Only 11 employees were found guilty and dismissed. The dismissed employees declared a dispute for unfair dismissal and approached the Commission for Conciliation, Mediation and Arbitration (the CCMA) for relief. It should be noted that one employee individually pursued her matter and was not assisted by a legal representative appointed by the trade union. The matter was heard by Senior Commissioner Dibden on 15 July 2019 just over a year after the dismissals.

1.4 Arbitration hearing (Commissioner's analysis of arguments and evidence)

The employees were represented by a legal practitioner appointed by their trade union (NUM). The employees were charged on three counts of misconduct: (i) The burning of company property (ii) the releasing of chemicals, specifically Comfort Maseko; (iii) and the intimidation of Prince Matsane specifically by Sibusiso Maseko.⁵²

1.4.1 Destruction of company property

In the incident with respect to burning company property, the Commissioner found that it was not disputed that the applicants were present and collectively involved in the removing of a barrier created with tyres and placing these behind the grader, before setting the tyres alight. It was also not disputed that they were seen to be building the fire closer to the grader, by continuing to place tyres on the front side of the fire.⁵³ It was further not disputed that the grader eventually caught alight and was damaged.⁵⁴

⁵¹ Mawasha op cit (n37)28.

⁵² National Union of Mineworkers obo Khumalo Sibusiso and 9 Others v Nkomati Joint Venture [2019] Case no: MP6005-18 (CCMA) at para 26.

⁵³ Nkomati supra (n52) at 27.

⁵⁴ Nkomati supra (n52) at 28.

The applicants' unhappiness initially stemmed from an averment that the respondent had acted inconsistently by not disciplining all the employees involved. South African labour courts have held in numerous decisions pertaining to collective misconduct, such as may occur in a strike that the employer may take disciplinary action against those employees which the employer could identify.⁵⁵ However, employers must be consistent in their discipline of employees.⁵⁶

This point was not pursued, and the applicants' unhappiness as eventually argued was based on two submissions, namely, that dismissal as a sanction for damaging company property, was too severe as a punishment, as the disciplinary code prescribed a lesser sanction; and secondly, on a submission that the applicants were not the employees who actually placed tyres on or under the grader, causing the grader to catch alight and burn.⁵⁷

The Commissioner found, that the applicants together with other striking employees worked in concert, collectively and deliberately.⁵⁸ They collected tyres that were used to create a safety barrier, stacked them and set them alight behind the grader.⁵⁹

The Commissioner stated that, if there was no intention to cause damage to the grader, they should or could have built the fire in the middle of the adjoining grass patch.⁶⁰ Why place tyres and set them alight specifically and directly behind the Grader, if the intention was not to cause harm? This was an act of defiance, a deliberate act to show the employer that the strikers were intent on having their demands met at any cost, even if it meant the grader must burn.⁶¹

The Commissioner found that: 'why did none of the applicants come forward and try to get the grader moved, when they saw that the fire was getting closer to the grader it? Surely, common sense would have dictated a different of action. Surely, the risk

⁵⁵ Nkomati supra (n49) at para 29. See also *South African Commercial Catering and Allied Workers Union and Other v Check One (Pty) Ltd* (D826/2009) [2012] ZALCD 3; (2012) 33 ILJ 1922 (LC).

⁵⁶ du Toit et al. op cit (n27) 448.

⁵⁷ Nkomati supra (n52) at 30.

⁵⁸ Nkomati supra (n52) at 31.

⁵⁹ Nkomati supra (n52) at 32.

⁶⁰ Nkomati supra (n52) at 33.

⁶¹ Nkomati supra (n52) at 34.

assessment training and safety risk assessment system, they had been exposed to on the mine, would have prompted them to act more cautious.⁶²

The Commissioner went on to state that, a reasonable employee would have or should have foreseen the risk associated with burning tyres directly behind the grader. It would be acting in bad faith to burn tyres, behind a vehicle filled with flammable petrol or diesel.⁶³

The Safety Manager Jacobus Wilsnach, testified that the tyres belonged to the company and had been used at the hard park to create a barricade to prevent vehicles being reversed from going over the edge.⁶⁴ He further testified that the making of uncontrolled fires was in breach of the company's policies and procedures. The policies had been established to give effect to the provisions of the Mine Health and Safety Act 29 of 1996 as well as to protect the forestry environment within which the mine was situated.⁶⁵ These policies were made known to the applicants through training and induction.⁶⁶ He submitted in testimony that from a socio-economic and environmental point of view, the mine had a responsibility to protect the interests of the forestry companies whose operations surrounded the mine. He confirmed that the penalty for damage of the company property was dismissal. One of the applicants, Sibusiso Khumalo under cross examination referred to item 3.19 of the disciplinary code of Nkomati which provides that dismissal is an appropriate sanction for the destruction of company property.⁶⁷ He testified that any uncontrolled releasing of chemicals by the mine posed serious risks of pollution to the environment.⁶⁸ He testified that non-striking employees were evacuated and the mine operations were closed due to the disruptive behaviour and further acts of violence, which was not disputed by applicants.⁶⁹

The Commissioner found that, it was patently clear and obvious, by the applicants' own admissions, that they deliberately took tyres not belonging to any individual applicant

⁶² Nkomati supra (n52) at 35.

⁶³ Nkomati supra (n52) at 36.

⁶⁴ Nkomati supra (n52) at 37.

⁶⁵ Nkomati supra (n52) at 38.

⁶⁶ Nkomati supra (n52) at 39.

⁶⁷ Nkomati supra (n52) at 40.

⁶⁸ Nkomati supra (n52) at 41.

⁶⁹ Nkomati supra (n52) at 43.

and/or bought by any individual applicant, from the hard park, rolled or dragged them behind the grader and not only set the tyres alight to create huge bonfire, but also fuelled the fire by bringing and stacking tyres in a manner deliberately to advance the fire closer and closer to the grader, inch by inch.⁷⁰

The Commissioner expressed, that the applicants worked collectively and in concert as a group of striking workers to take tyres, which belonged to the employer, from a place where they were used for reasons of safety (barricades) and used them for the purpose of advancing their strike, by deliberately burning the tyres. It was this action which was the cause of the respondent's unhappiness and lead to the charge of misconduct related to deliberately damaging company property. The starting of an uncontrolled fire was the action which lead to the breach of mines standards and policies related to fires and fire prevention thereof. The eventual consequence thereof was the grader being set alight. The applicants' actions led to damage, which could have been averted if the applicants had applied the necessary risk assessment within the circumstances.⁷¹

Furthermore, the Commissioner found that, when employees chose to work collectively to advance their collective demands, they lost their individualism and must accept collective responsibility and liability for their actions.⁷²

On the charge of destruction of company, the Commissioner found that the dismissal of the employees was procedurally and substantively fair.

The Commissioner went on to make findings on another charge which was against one individual namely Comfort Maseko who was charged for releasing of chemicals.

1.4.2 Releasing of chemicals

With respect to the incident involving the releasing of chemicals at the decompression plant, the Commissioner found that it was not disputed that Comfort Maseko was seen on video entering the specific premises in the morning of 23 April 2018 and was also the

⁷⁰ Nkomati supra (n52) at 44.

⁷¹ Nkomati supra (n52) at 45.

⁷² Nkomati supra (n52) at 46.

only person seen leaving the premises and that he had actually activated the release of the chemicals.⁷³

The applicant's defense was that he went into the plant to fetch his cellular phone and wallet which he left there the previous day. The Commissioner stated that this defense was never put to the respondent's witness and secondly the applicant and his witnesses' submission that the company witness evidence should be disregarded, as the witness never worked in the plant, was frivolous and absurd.⁷⁴ The Commissioner stated that, the applicant never gave any other reasonable explanation to show who else on the day in question could have and/or may have, been responsible for activating the release mechanism.⁷⁵ The Commissioner found that there was not a shred of credible evidence of any other employee being in the plant at the same time as the applicant.⁷⁶ Comfort worked in the plant and had knowledge of the operation and layout.⁷⁷ Comfort, testified that in the plant, there were four employees who worked on a four-shift cycle, essentially one employee per shift.⁷⁸ He confirmed that he was the employee who was due to start work at 08h00 on the day in question.⁷⁹ There was also no credible evidence from Comfort to rebut the documentary evidence in respect of the chemicals having been released at or around the time testified to by the respondent's witness and as depicted on the flowcharts.⁸⁰

The plant was automated and monitored by controlled instruments and computers and could be operated by one employee on shift.⁸¹ The Commissioner also expressed that it would have been a simple task for an experienced operator, like the applicant, to activate the auto release valve and then casually walk out of the plant.⁸²

⁷³ Nkomati supra (n52) at 47.

⁷⁴ Nkomati supra (n52) at 48.

⁷⁵ Nkomati supra (n52) at 49.

⁷⁶ Nkomati supra (n52) at 50.

⁷⁷ Nkomati supra (n52) at 51.

⁷⁸ Nkomati supra (n52) at 52.

⁷⁹ Nkomati supra (n52) at 53.

⁸⁰ Nkomati supra (n52) at 54.

⁸¹ Nkomati supra (n52) at 55.

⁸² Nkomati supra (n52) at 56.

Comfort's defense that, he only went into the plant, to go to his locker, to fetch his wallet and cellular phone was never put to any of the respondent's witnesses to either rebut or confirm.⁸³ This was a fatal flaw in the applicant's defense. Firstly, he arrived on the premises just after 07h00 and had ample opportunity to go and collect his personal belongings before joining the other striking workers. The fact that he joined the collective action before going onto the plant could not be coincidental to what subsequently unfolded.⁸⁴ Secondly, it was unlikely nowadays to leave work, without a wallet and cellular phone and get into a taxi and go home.⁸⁵

The Commissioner found that, although the evidence was circumstantial against Comfort Maseko, a logical inference could be drawn from oral submissions when assessed in conjunction with the video and documentary evidence and in the absence of any credible or reliable evidence which could have identified any other perpetrator, besides the applicant.⁸⁶

Ganson Moses, employed as a supervisor, testified that the most probable explanation in the circumstances was that Comfort had activated the release of the chemicals which caused a loss of R40 000.00 to the company.⁸⁷ Jacobus Wilsnach, testified that the releasing of the chemicals posed an operational and environmental risk and was a deliberate act of sabotage.⁸⁸

The Commissioner found that the employer's version was more probable and that the dismissal of Comfort Maseko for his misconduct, in that he released chemicals was procedurally and substantively fair.

1.4.3 Intimidation incident

With respect to the incident involving the intimidation of Prince Matsane (Prince) in the store warehouse, the Commissioner found that, it was not disputed that Sibusiso Maseko

⁸³ Nkomati supra (n52) at 57.

⁸⁴ Nkomati supra (n52) at 58.

⁸⁵ Nkomati supra (n52) at 59.

⁸⁶ Nkomati supra (n52) at 60.

⁸⁷ Nkomati supra (n52) at 61.

⁸⁸ Nkomati supra (n52) at 62.

(Maseko) had been with the group who had been singing outside the store warehouse building and then entered the premises.⁸⁹ Maseko had gone to where Prince had been standing at the manager's office door.⁹⁰

It was also not disputed that Maseko was seen on video within the store warehouse with a stick and/or that he was later captured on video walking outside the same building together with other striking employees with the same stick in his hands.⁹¹ Maseko denied acting in a threatening manner towards Prince but conceded that when he met with Prince the following day, together with Innocent Ndlazi (Ndlazi) who acted as a mediator, Prince had told him (Maseko) that, he had felt threatened by his actions.⁹²

Prince testified that the next day subsequent to the strike, Maseko came with Innocent Ndlazi (Ndlazi) and had apologized for his behaviour and this crucial piece of evidence, offered up by Prince was not challenged in cross examination.⁹³ According to the Commissioner, 'Maseko apologized, no doubt because he believed this would or might absolved him from wrong doing and/or Prince would not proceed with a complaint to management. This was like trying to close the stable door after the horse had bolted and ran away.⁹⁴ Why go and see Prince with another employee, who in Maseko's own words, acted as a mediator and apologize if there had been no threatening behavior?'⁹⁵

The Commissioner found that Maseko's defense that he had found the stick just lying inside the stores was absurd. 'On the video it was plain to see that the stores exercised a high degree of good housekeeping and the floors were meticulously clean, painted, devoid of obstructions and/or junk.⁹⁶ What was the likelihood that the employees who kept a very clean store would not have seen and picked up a stick, simply lying around, as it would have posed a risk in the first instance?'⁹⁷ Why did Maseko not place the stick

⁸⁹ Nkomati supra (n52) at 63.

⁹⁰ Nkomati supra (n52) at 64.

⁹¹ Nkomati supra (n52) at 65.

⁹² Nkomati supra (n52) at 66.

⁹³ Nkomati supra (n52) at 67.

⁹⁴ Nkomati supra (n52) at 68.

⁹⁵ Nkomati supra (n52) at 69.

⁹⁶ Nkomati supra (n52) at 70.

⁹⁷ Nkomati supra (n52) at 71.

in a bin or give it to any other employee in the store at the time to dispose of?⁹⁸ Why did he specifically keep the stick and go seek out Prince with it in his hand, if the intention was not to carry the stick as a weapon of intimidation?⁹⁹

Prince testified that he was a union member and on the day in question he was at his work station in the stores, when he heard and saw the striking workers and Maseko singing outside. When Maseko came into the stores with the stick in his hand, he went to the manager's office, seeking a place of safety, in the doorway, where Maseko found him and tried to grab him and then made as if he was going to strike Prince with the stick.¹⁰⁰

Prince had further testified that he had felt scared and threatened by Maseko's behavior and actions. He was after all a National Union of Mineworkers (NUM) member and had not willingly joined the strike.¹⁰¹ Maseko had no work reason to go into the store. He was there on a mission, with a stick in his hand to put fear into non-striking employees' hearts. This was no tea and cake meeting to discuss in a gentlemanly manner the pros and cons of the strike. The Commissioner found that, 'persuasion was by a display of intimidation. The message was clear: join the strike or get beaten with a stick.'¹⁰²

The Commissioner expressed that, 'intimidation may be perceptible and/or imperceptible by nature.'¹⁰³ Thus, on balance of probability the respondent version supported by videos, documents and oral testimony as well as the admissions on behalf of the applicants should be preferred' and that the sanction of dismissal should not be interfered with.¹⁰⁴

The above Nkomati case illustrated that misconduct committed during strikes may have far reaching consequences. Without doubt, it was not the intention of the Constitution or the LRA that strikes should attract adverse consequences for employees. Employees are expected to follow procedural requirements of a protected strike and refrain from any misconduct during their strike. The next section will outline the purpose of this study and

⁹⁸ Nkomati supra (n52) at 72.

⁹⁹ Nkomati supra (n52) at 73.

¹⁰⁰ Nkomati supra (n52) at 74.

¹⁰¹ Nkomati supra (n52) at 75.

¹⁰² Nkomati supra (n52) at 76.

¹⁰³ Nkomati supra (n52) at 77.

¹⁰⁴ Nkomati supra (n52) at 78.

deal with a problem of non-compliance with the procedural requirements which renders the strike unprotected. In addition to illustrate that misconduct may attract delictual claims and sometimes criminality.

1.5 Problem statement and purpose

The right of employees to strike is entrenched in the Constitution of the Republic of South Africa in terms of section 23(2)(c). It is important to note that the right may nonetheless be limited as encapsulated in section 36 of the constitution.¹⁰⁵

The primary objective for employees to embark into to a strike action is to inflict economic harm on their employers so that the employer will accede to their demands.¹⁰⁶ The abuse of such power by trade union or employees has become rather a thorny issue for employers.¹⁰⁷

The main purpose of this study is to analyze in depth the legal implications of employees' participation in unprotected strikes. The study will cover the following discussions: Chapter 1 gives the introduction and background. Chapter 2 deals with the legal framework. Chapter 3 deals with remedies. Lastly, Chapter 4 draws conclusions and makes recommendations.

The study will also determine if Schedule 8 of the Code of Good Practice: Dismissal, according to item 6(2), is effective in deterring unprotected strikes and unlawful conduct during strikes. The study examines the Nkomati disciplinary code and procedure mechanisms to curb unprotected strikes that are marred with unlawful conduct.

The amount of violence during strikes in South Africa is escalating.¹⁰⁸ Given the prevalence of violent misconduct during strikes, this study will also determine how Nkomati should deal with this during strikes.¹⁰⁹ The study will be relevant to all sorts of

¹⁰⁵ Mawasha op cit (n37)1.

¹⁰⁶ *Stuttafords Department Stores Ltd v Southern African Clothing and Textile Workers Union (CA2/00) [2000] ZALAC 22 (2 November 2000)* at para 24.

¹⁰⁷ Tom op cit (n22)6.

¹⁰⁸ Gcume op cit (n21)18.

¹⁰⁹ Gcume op cit (n21)18.

unprotected and violent strikes, while the Nkomati events provide an example of one situation.

The study will determine if there are any areas of the law or other alternative mechanisms that can be developed to curb the occurrence of unprotected strikes associated with unlawful conduct. The next chapter will deal with the areas of the law or legal framework.

Chapter 2

THE LEGAL FRAMEWORK

2.1. Introduction

The importance of the right to strike for employees is well known but it has far reaching consequences for employers. This chapter examines the law regulating strikes in South Africa with reference to the implications of this right for Nkomati.

Employees have a Constitutional right to strike but that right has limitations¹¹⁰ including the need to follow procedures in terms of section 64 of the LRA which will be discussed in detail later in this chapter together with the prohibitions as provided for in terms of section 65 of the LRA and the definitional requirements of the strike in terms of the LRA.¹¹¹

Employees are therefore protected from dismissal for participating in a protected strike that is, a strike that followed required procedures in terms of the LRA.¹¹² Even if a strike is protected, unlawful acts such as violence, vandalism, intimidation and so forth will not be protected by the law.¹¹³ Therefore an employer may take disciplinary action against wrongdoers in such circumstances.¹¹⁴ This will be explained in detail in chapter 3.

The LRA has made it relatively easy for employees to strike and therefore strikes should enjoy legal protection, yet more than half of the strikes that occur in South Africa are unprotected.¹¹⁵ Trade unions for instance often ignore the procedural requirements for

¹¹⁰ Section 23(1)(c) of the Constitution provides that, every worker has the right to strike. To the extent that the legislation may limit a right, the limitation must comply with section 36(1).

¹¹¹ The LRA.

¹¹² du Toit et al. op cit (n29)355.

¹¹³ Grogan Johan, Dismissal 2ed (2014)563.

¹¹⁴ Venter and Levy, *Labour Relations in South Africa* 5ed (2014)555.

¹¹⁵ *South African Clothing and Textile workers Union and Others v Filtafelt (Pty) Ltd (JS263/15) [2017] ZALCJHB 483 (LC)*, at para 1.

protected strikes and simply call strikes regardless of them.¹¹⁶ Nkomati employees and their trade union NUM were only required to follow the employer's grievance procedure to resolve the issue in dispute.¹¹⁷ If the issue remained unresolved the employees or their trade union had to follow the procedural, substantive and definitional requirements as provided for in the LRA for a protected strike.¹¹⁸

2.2. International standards

There is an international recognition of the right to strike.¹¹⁹ Article 8(d) of the International Covenant on Economic, Social and Cultural Rights requires governments that are party to the covenant to undertake to ensure the right to strike, provided that it is exercised in conformity with domestic laws.¹²⁰ The International Labour Organization (the ILO) does not explicitly recognize the right to strike, it recognizes it as an intrinsic corollary to Article 3(1) of Convention No.87.¹²¹ 'The supervisory bodies of the ILO contended that the right to strike can be derived from Convention 87 and 98.'¹²² The right to strike is a vital tool for collective bargaining as per Convention 98.¹²³ South Africa is a member state of the ILO, and it accordingly also recognizes the right to strike as a vital right for collective bargaining.¹²⁴ A direct connection can be drawn between the LRA and Convention 87 of the ILO Convention.¹²⁵ In South Africa the LRA plays a vital role in terms of outlining the

¹¹⁶ Tenza op cit (n3)28.

¹¹⁷ Mchunu op cit (n41)1.

¹¹⁸ Section 64 of the LRA.

¹¹⁹ Mawasha op cit (n37)9.

¹²⁰ Tenza op cit (n3)155.

¹²¹ Venter and Levy op cit (n114)532-3.

¹²² Achmat W, The right to strike and its limitations (LLM dissertation, University of Pretoria, 2015) 7. https://repository.up.ac.za/bitstream/handle/Achmat_Right_2016. Accessed on 09/04/2019.

¹²³ Achmat op cit (n122)7.

¹²⁴ Malebye CD, The right to strike in respect of employment relationships and Collective Bargaining (LLM dissertation, University of Pretoria, 2014) 2.

¹²⁵ Mawasha op cit (n37)14. See also "Section 3 of the LRA provides that any person applying this Act must interpret its provisions:-(a) to give effect to its primary objects; (b) in compliance with the Constitution; and (c) in compliance with the public international law obligations of the Republic."

requirements pertaining to a protected strike; other countries have their own legislative framework in managing strikes.¹²⁶

The right to strike is enshrined in the constitutions of South Africa, Zimbabwe, Malawi and Namibia and in other Southern Africa Development Community (SADC) countries the right to strike is regulated by dedicated labour legislation.¹²⁷

2.3. The Constitution of the Republic of South Africa, Act 108 of 1996

Section 39 of the Constitution provides that when a court is interpreting chapter 2 of the Constitution, it must consider international law. The conventions and recommendations of the ILO are therefore important resources.¹²⁸

The Bill of Rights contains most of the guaranteed rights enshrined in the Constitution.¹²⁹ The rights contained in the Bill of Rights are given effect by way of legislation.¹³⁰ As the Constitution is the highest law in South Africa any legislation or provision in such legislation needs to comply with the Constitution.¹³¹ The right to strike is entrenched in the Constitution as provided for in section 23 (2) (c): 'every worker has the right to strike.'¹³² As a result, the LRA was enacted to give effect to the right to strike.¹³³ A key difference between the right to strike in section 23 (2) (c) of the Constitution and section 64 of the LRA, is that in the Constitution it is granted to every worker, whereas in the LRA

¹²⁶ Mawasha op cit (n37)14.

¹²⁷ Le Roux R and Cohen T "Understanding the Limitations to the Right to Strike in Essential and Public Services in the SADC Region" *PER / PELJ* 2016(19) 3.

¹²⁸ *South African National Defence Union v Minister of Defence and Another* [1999] ZACC 7; 1999 (4) SA 469 (CC) at para 25.

¹²⁹ Tenza op cit (n3)81.

¹³⁰ Tenza op cit (n3)81.

¹³¹ Tenza op cit (n3)81. See also in *Transport and Allied Workers Union of South Africa obo MW Ngedle and 93 Others v Unitrans Fuel and Chemical (Pty) Limited* [2016] ZACC 28 at para 220.

¹³² The Constitution.

¹³³ *National Union of Public Service & Allied Workers and Others v National Lotteries Board* [2014] ZACC 10 at para 69.

it is granted to every employee.¹³⁴ Thus, the Constitution¹³⁵ provides for a wider scope of inclusion of persons in the right to strike, than the narrower scope of inclusion contained in the LRA.¹³⁶

The right to strike is granted without express limitation.¹³⁷ However, just like other rights in the Constitution, it is not absolute and remains subject to the limitations clause contained in section 36.¹³⁸ The author do not intend to engage in a full limitations clause analysis; as it is beyond the scope of this dissertation. However, it is vital to point out that: A limitation of a right in terms of section 36(1) of the Constitution provides that, 'the rights in the Bill of Rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.'

The right to strike may be limited and there are advantages to limiting it once it has become dysfunctional and violent, however it is important to guard against defeating the purpose of section 23 of the Constitution by limiting the protection of the right to strike to strikes which are peaceful.¹³⁹ Arguably, the rights of other people to live peacefully is more important than the employees' right to engage in violent industrial action.¹⁴⁰ For example, the demands of Nkomati employees which were the subject of unlawful activities could have been dealt with by means of constructive and meaningful dialogue between trade union representatives and management without having to commit unlawful

¹³⁴ Mbona op cit (n1)11.

¹³⁵ The Constitution.

¹³⁶ The LRA.

¹³⁷ Mbona op cit (n1)10. See also in *CWIU v Plascon Decorative (Inland) (Pty) Ltd [1998] 12 BLLR 1191 (LAC)* at para 21.

¹³⁸ Mbona op cit (n1)11. See also section 36 of the Constitution.

¹³⁹ Tenza op cit (n3)80.

¹⁴⁰ Tenza op cit (n3)80.

activities.¹⁴¹ While it is beyond the scope of this dissertation to engage in a full limitations clause analysis, limiting the right to strike by providing that strikes may only be protected under the LRA to the extent that they are peaceful (and conduct in furtherance of the strike is too), may be justified as the LRA is a law of general application.¹⁴² The purpose of the proposed limitation is valid, being to protect the right of other people from unlawful and disorderly conduct by unruly strikers.¹⁴³ In the author's view, this limitation will be in line with the values of the constitution of establishing a society based on human dignity, equality and freedom.¹⁴⁴

2.4. The Labour Relations Act 66 of 1995

The LRA was enacted to give effect to the labour relations clause conferred by section 23 of the constitution.¹⁴⁵

In addition to giving effect to the constitutional rights conferred by section 23 of the constitution, the LRA seeks to:

- 'advance economic development;
- social justice, labour peace and the democratization of the workplace;

¹⁴¹ Tenza op cit (n3)81. See also in *PTAWU obo Khoza and Others v New Kleinfontein Goldmine (Pty) Ltd* (2016) 37 ILJ 1728 (LC) at para 72, the court stated that "There is no justification why, when simple mechanisms exist to regularise a strike, economic damage can be inflicted on an employer, without those mechanisms being invoked and thereby ensure a reasonable opportunity to resolve the dispute is created. Had the union more diligently pursued the organisational rights demands to their logical conclusion using the dispute mechanisms available, it might well have achieved those aims possibly without even having to resort to industrial action."

¹⁴² Tenza op cit (n3)82.

¹⁴³ Tenza op cit (n3)82.

¹⁴⁴ Tenza op cit (n3)82. See also *FAWU and Others v Premier Foods Ltd t/a Blue Ribbon Salt River* (C 722/2012) [2012] ZALCCT 36; [2012] 12 BLLR 1281 (LC); (2013) 34 ILJ 1171 (LC) at para 4 the court held: 'It is certainly not acceptable to force an employer through violent and criminal conduct to accede to their demands. This type of vigilante conduct not only seriously undermines the fundamental values of our Constitution, but only serves to seriously and irreparably undermine future relations between strikers and their employer. Such conduct further completely negates the rights of non-strikers to continue working, to dignity, to safety and security and privacy and peace of mind.'

¹⁴⁵ Section 1(a) of the LRA.

- to give effect to international obligations incurred by South Africa as member state of the ILO; and
- to provide a statutory framework within which employees or their trade unions and employers or employers' organizations can collectively bargain to determine the terms and conditions of employment and other matters of mutual interest.¹⁴⁶

There is a difference between strikes that comply with the requirements of Chapter IV of the LRA (including sections 64 and 65 particularly) and those that do not comply.¹⁴⁷ The strikes that comply are referred to as protected strikes.¹⁴⁸ In addition, it is generally accepted that to be protected, the strike must comply with the definitional requirements of the LRA as earlier discussed. Strikes that do not comply are referred to as unprotected strikes.¹⁴⁹ In order for a strike to meet the requirements of section 64, the employees must comply with provisions of section 64 of the LRA unless one of the situations in section 64(3) of the LRA applies. These include that:

- a) 'the parties to the dispute are members of a council, and the dispute has been dealt with by that council in accordance with its constitution;
- b) the strike conforms with the procedures in a collective agreement;
- c) the employees strike in response to a lock-out by their employer that does not comply with the provisions of this Chapter;
- d) the employer locks out its employees in response to their taking part in a strike that does not conform with the provisions of this Chapter;
- e) the employer fails to comply with requirements of subsections (4) and (5).¹⁵⁰

¹⁴⁶ Section 1 of the LRA. See also Tenza op cit (n3) 68.

¹⁴⁷ Nel et al. South African Employment Relations, Theory and Practice 8ed (2016)307.

¹⁴⁸ Section 67(1) of the LRA.

¹⁴⁹ Bendix op cit. (n8)665.

¹⁵⁰ Section 64(3) of the LRA.

In terms of the LRA, the dismissal of an employee for participating in a protected strike or for indicating an intention to participate in such a strike is automatically unfair.¹⁵¹ The right to strike allows workers to protect their dignity. The LRA limits the right to strike in various ways, through its definitional, procedural and substantive requirements for a protected strike. The LRA defines a strike as follows:

“The partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to ‘work’ in this definition includes overtime work, whether it is voluntary or compulsory.”¹⁵²

It is clear from the definition that certain elements must exist for employee actions to be termed a strike. These elements are as follows:

(a) It must be a collective action (by persons) a concerted refusal to work implies two or more persons acting with a common purpose.¹⁵³ This suggests that a single person cannot strike.¹⁵⁴

(b) There should be a refusal to work, the said refusal must be to remedy a grievance or resolve a dispute.¹⁵⁵ This was confirmed in *Leoni Wiring Systems (East London) (Pty) Ltd v National Union of Metalworkers of SA & other*, where the court held that:

“it is always a requirement that, if anyone of the parties is in dispute with the other, such dispute should be stated clearly and not be clothed in such a way that, objectively viewed, the other side does not know that it is in dispute at all. I am firmly of the view that parties should not conduct themselves in any manner which

¹⁵¹ Section 187(1) of the LRA.

¹⁵² Section 213 of the LRA.

¹⁵³ du Toit et al. op cit (n29)335.

¹⁵⁴ *Schoeman v Samsung Electronics SA (Pty) Ltd [1997] 10 BLLR 1364 (LC) 1367.*

¹⁵⁵ du Toit et al. op cit (n29)336.

may lead to a situation where the other side is left in doubt as to whether there is a dispute between them in relation to a particular issue.”¹⁵⁶

The *Leoni Wiring Systems (East London) (Pty) Ltd* case above suggest that, if one party is not aware of any dispute or grievance there will be nothing to remedy, therefore a dispute or grievance resulting in employees refusing to work must be clearly identified to parties in order to be resolved.

(c) The act may stop, retard or obstruct work; this contemplates a situation where employees continue to work at reduced levels of productivity and this is usually referred to as a “go slow”. As the words suggest, employees perform duties at a slow pace resulting in reduced productivity levels.¹⁵⁷ It may include circumstances where employees physically obstruct work or perform duties in terms of their contract of employment which has the effect of retarding and obstructing the normal flow of work and this is usually referred to as a “work to rule”.¹⁵⁸ In practice employees only perform their duties in terms of their contract of employment.

(d) Persons who are or have been employed by an employer are also permitted to strike.¹⁵⁹ The inclusion of the phrase “persons who are or have been employed by an employer” in the definition of a strike is intentional.¹⁶⁰ Its inclusion can be traced to the decision of the Supreme Court in the matter between *R v McDonald* 1923 TPD 153 where a mass of employees resignations in support of a wage demand did not constitute a strike in that, after their resignation, workers ceased to be employees since those employees unilaterally decided to end their relationship with the employer.¹⁶¹ ‘Shortly thereafter the definition of a strike was amended to include the phrase.’¹⁶²

¹⁵⁶ *Leoni Wiring Systems (East London) (Pty) Ltd v National Union of Metalworkers of SA & other* (2007) 28 ILJ 642 (LC) at para 27.

¹⁵⁷ du Toit et al. op cit (n29)335.

¹⁵⁸ du Toit et al. op cit (n29)335.

¹⁵⁹ du Toit et al. op cit (n29)335.

¹⁶⁰ du Toit et al. op cit (n29)335.

¹⁶¹ du Toit et al. op cit (n29)335.

¹⁶² du Toit et al. op cit (n29)336.

This amendment suggested that employees whose contracts of employment had been terminated could strike.¹⁶³

(e) 'The employees may be employed by the same employer or by different employers.'¹⁶⁴ This indicates that a strike may involve the employees of more than one employer.¹⁶⁵ 'Multi-employer strikes imply that the employees have a common and direct interest in the dispute that is the subject matter of the strike.'¹⁶⁶ For example, strikes in the Industrial Chemicals sector, where employees in an entire industry strike in respect of common grievances or disputes. In addition the LRA provides for secondary strikes which are regulated by section 66. It is however, beyond the scope of this dissertation to look into this topic in detail.¹⁶⁷

(f) The dispute must be in respect of any matter of mutual interest between employer and employee and that if the dispute is not levelled against an employer by employees, which the employer has some control to remedy, then it is not something over which the employees can strike.¹⁶⁸

In *Vanachem Vanadium Products (Pty) Ltd v NUMSA*, van Niekerk had this to say with regard to the meaning of mutual interest: 'it is not necessary for present purposes to define the term 'matters of mutual interest' with any precision, but it seems to me that it requires, in broad terms, no more than that the issue that is the subject of any term of any collective agreement, referral for conciliation or the subject of any strike or lock-out be work-related, or as the court put it in the *De Beers* decision (supra), it must concern the employment relationship.'¹⁶⁹

¹⁶³ du Toit et al. op cit (n29)336.

¹⁶⁴ du Toit et al. op cit (n29)336.

¹⁶⁵ du Toit et al. op cit (n29)336.

¹⁶⁶ du Toit et al. op cit (n29)336.

¹⁶⁷ Section 66 of the LRA.

¹⁶⁸ *Mzeku and Others v Volkswagen SA (Pty) Ltd and Others* [2001] 8 BLLR 857 (LAC) at para 16. See also du Toit et al. op cit (n27)338.

¹⁶⁹ *Vanachem Vanadium Products (Pty) Ltd v National Union Of Metalworkers Of SA and Others*(J658/14) [2014] ZALCJHB 159; [2014] 9 BLLR 923 (LC); (2014) 35 ILJ 3241 (LC) at para 17.

Further to the definition, every reference to work includes overtime work, whether it is voluntary or compulsory, as held in *Gobile v BP Southern Africa (Pty) Ltd and Others*. In this matter Gobile and two other employees refused to work overtime and on public holidays.¹⁷⁰ The employer approached the Labour Court for relief and obtained a declaratory order that the employees' refusal was in breach of their terms and conditions of employment contracts and amounted to an unprotected strike.¹⁷¹ The employees held contrary views to that of their employer and expressed that they were not contractually obliged to work overtime and on public holidays.¹⁷² Both the Labour Court and the Labour Appeal Court concurred that employees were contractually obliged to work overtime and on public holidays.¹⁷³ The employees' refusal to work was not accompanied by any demand whatsoever.¹⁷⁴ The Labour Appeal Court inquired into the purpose of employees' action in order to decide whether their refusal to work constituted a strike or not.¹⁷⁵ The court held that the employees' aim was to put pressure on the employer to accede to their interpretation of what their contractual obligations should be.¹⁷⁶ Therefore, their actions fell within the definition of a strike.¹⁷⁷

Having dealt with the definition of a strike above, it is also crucial to deal with the requirements of both sections 64 & 65 of the LRA.

Section 64(1)(a) of the LRA provides that, every employee has the right to strike if—

The issue in dispute has been referred to a council or to the Commission in terms of the LRA— (i) a non-resolution certificate has been issued; or (ii) a period of 30 days, or any

¹⁷⁰ Mbona op cit (n1)8.

¹⁷¹ *Gobile v BP Southern Africa (Pty) Ltd & Others*. Labour Appeal Court (ja51/98). https://heinonline.org/hol-cgi-bin/get_pdf.cgi?iljuta20. Accessed on 31/10/2019.

¹⁷² *Gobile* op cit (n171)1.

¹⁷³ *Gobile* op cit (n171)1.

¹⁷⁴ Mbona op cit (n1)8.

¹⁷⁵ Mbona op cit (n1)8.

¹⁷⁶ Mbona op cit (n1)8.

¹⁷⁷ In *Gobile v BP Southern Africa (Pty) Ltd and Others* (1999) 20 ILJ 2027 (LAC) at para 9.

extension agreed upon by parties to the dispute has elapsed.¹⁷⁸ In *SATAWU and Others v Moloto NO and Another*, the constitutional court held that section 64 of the LRA entitles all employees in a bargaining unit, whether unionised or non-unionised, to participate in a protected strike if the majority union has referred the dispute for conciliation.¹⁷⁹ Therefore, the first requirement before embarking in a strike is a conciliation process under the auspices of the council or CCMA.

Section 64(1)(b) of the LRA provides that, the employer should be given at least 48 hours' notice. If the state is the employer 7 days' notice is required.¹⁸⁰ The notice must be in writing before the commencement of the strike,¹⁸¹ unless— (i) the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or (ii) the employer is a member of an employers' organisation that is a party to the dispute, in which case, notice must have been given to that employers' organisation.¹⁸²

Section 65(1) of the LRA provides "limitations on right to strike" and states:

Employees may not embark in a strike or in any conduct in contemplation or furtherance of a strike if—

¹⁷⁸ The LRA.

¹⁷⁹ *South African Transport and Allied Workers Union and Others v Moloto NO and Another* (2012) 33 ILJ 2549 (CC) at para 6.

¹⁸⁰ Section 64(1)(d) of the LRA.

¹⁸¹ *Moloto supra* (n179) at 15.

¹⁸² In *Ceramic Industries Ltd t/a Betta Sanitary ware and Another v National Construction Building and Allied Workers Union and Others* [1997] 6 BLLR 697 (LAC) at 702 F- I the Court held that "section 64 (1)(b) gives expression to the object of the LRA by requiring written notice of the commencement of the proposed strike. The purpose of the notice is to give an employer advance warning of the proposed strike so that an employer may prepare for the power-play that will follow. That specific purpose is defeated if the employer is not informed in the written notice in exact terms when the proposed strike will commence."

(a) those employees are bound by a collective agreement that prohibits a strike in respect of the issue in dispute;¹⁸³

(b) those employees are bound by an agreement that requires the issue in dispute to be referred to arbitration;¹⁸⁴

(c) a party in dispute has a right to refer the issue in dispute to arbitration or to the Labour Court in terms of the LRA or any other employment law;¹⁸⁵

(d) those employees are engaged in—(i) an essential service;¹⁸⁶ or (ii) a maintenance service.¹⁸⁷

In addition section 65(3) provides that: ‘subject to a collective agreement, no person may take part in a strike or in any conduct in contemplation or furtherance of a strike — (a) if that person is bound by— (i) any arbitration award or collective agreement that regulates the issue in dispute.’¹⁸⁸

¹⁸³ In *BMW SA (Pty) Ltd v National Union of Metalworkers of SA on behalf of Members* (2012) 33 ILJ 140 (LAC) at 146E-F and 152A, the court held that since the National Bargaining Forum did not cover the issue in dispute (payment of a transport allowance to hourly paid employees) the union was entitled to embark on strike action provided it complied with the provisions of the LRA.

¹⁸⁴ Section 65(3)(a)(i) of the LRA 66 of 1995 is interpreted to mean that if the parties in dispute have agreed to arbitration as a method of resolving a dispute, they may not strike to resolve the dispute. The agreement takes away their right to strike.

¹⁸⁵ Section 65(1)(c) of the LRA prohibits strike over issues that a party may refer to arbitration or adjudication.

¹⁸⁶ In *South African Police Service v Police and Prisons Civil Rights Union and Others (J1444/2007) [2007] ZALC 44; [2007] 10 BLLR 978 (LC)* at paras 26 & 27 the court stated that not all employees of SAPS render an essential service. The court further stated that the interruption of the service of tea ladies, gardeners’ human resource personnel and finance administrators at SAPS would not “*endanger the life, personal safety or health of the whole or any part of the population.*”

¹⁸⁷ In terms of the provisions of section 75(1) of the LRA, ‘a service is a maintenance service if its interruption will result in material physical destruction to any working area, plant or machinery.’ Maintenance service employees are not allowed to legally participate in a strike. Their dispute is resolved by arbitration.

¹⁸⁸ *du Toit op cit.* (n29)354 state that, an arbitration award includes the award of the CCMA, a bargaining council, an accredited agency or private arbitration body. Parties are prohibited from industrial action if the outcome of the arbitration is unfavourable. The award would be final and binding.

Having dealt with the definition of a strike and the requirements of a protected strike in terms of the provisions of section 64 and 65 of the LRA. The following section will deal with the consequences of both protected and unprotected strikes.

2.4.1. The consequences of protected strike.

At common law, any conduct by employees that involved the withdrawal of rendering of services such as striking was treated as breach of contract.¹⁸⁹ On establishing that employees were in breach of their contracts of employment, the employer had powers to terminate the employment contracts of those striking employees.¹⁹⁰ Section 67 of the LRA changes this position.¹⁹¹ A protected strike was introduced by section 67 of the LRA.¹⁹² This section affords striking employees or the trade union protection if their strike complies with Chapter IV of the LRA.¹⁹³ Section 67(2) of the LRA provides that participation in such a strike does not amount to a delict or breach of contract and civil proceedings may not be instituted against a person for participating in a strike or in furtherance of a protected strike.¹⁹⁴

In terms of the LRA, the dismissal of an employee for participating in a protected strike or for indicating an intention to participate in such a strike is automatically unfair.¹⁹⁵ The right to strike allows workers to protect their dignity.¹⁹⁶

Section 67(4) provides that an employer may not dismiss employees for participating in a protected strike or in furtherance of a protected strike, even though the employer may apply the principle of no work no pay.¹⁹⁷ It is therefore apparent that an employer may not dismiss any employees who lawfully exercised their right to participate in a protected

¹⁸⁹ Grogan op cit (n113)553.

¹⁹⁰ Mohale op cit (n23)58.

¹⁹¹ Section 67 of the LRA.

¹⁹² Section 67(1) of the LRA.

¹⁹³ Section 67(1) of the LRA.

¹⁹⁴ The LRA.

¹⁹⁵ Section 187(1) of the LRA.

¹⁹⁶ Mohale op cit (n23)19.

¹⁹⁷ Section 67(3) of the LRA.

strike or any lawful conduct in furtherance of a protected strike and that those persons do not commit a delict or breach of their contracts.¹⁹⁸

Section 67(6) is even more specific, in that it provides that no civil legal proceedings may be instituted against any person as result of his or her participation in a protected strike.¹⁹⁹ Simply put, trade unions and employees enjoy immunity from civil prosecution if the strike or conduct in furtherance of a strike is protected.²⁰⁰ This immunity from civil prosecution during a protected strike is not without limitations.²⁰¹ Striking employees remain vulnerable to dismissals for misconduct committed during the strike as well as dismissals due to operational requirements of the business, regardless of whether these eventualities were triggered by a strike or not.²⁰²

Section 67(8) of the LRA specifically excludes from protection any conduct which is unlawful during the strike.²⁰³ It stipulates that ‘the provisions of subsections (2) and (6) do not apply to any act in contemplation or in furtherance of a strike...if that act is an offence.’²⁰⁴ For instance unlawful conduct such as violence, intimidation and the killing of people will always attract criminal prosecution.²⁰⁵ Even the courts seek to deter unlawful activities during strikes, as held in *RAM Transport (SA) (Pty) Ltd v South African Transport Allied Workers*, where the Labour Court stated that it is ‘always open to those who seek the protection of the right to strike.’ It further expressed that ‘those who commit acts of criminal and other misconduct during the course of strike action in breach of an order of this court must accept in future to be subjected to the severest penalties that this court is entitled to impose’.²⁰⁶

¹⁹⁸ Tenza op cit (n3)176.

¹⁹⁹ The LRA.

²⁰⁰ Tenza op cit (n3)122.

²⁰¹ Tenza op cit (n3)122.

²⁰² Tenza op cit (n3)35. See also section 67(5) of the LRA.

²⁰³ The LRA.

²⁰⁴ Section 67(8) of the LRA.

²⁰⁵ Tenza op cit (n3)122.

²⁰⁶ *RAM Transport (SA) (Pty) Ltd v South African Transport Allied Workers Union (J106/2011) [2011] ZALCJHB 3; (2011) 32 ILJ 1722 (LC)* at para 9.

2.4.2 The consequences of an unprotected strike.

If a strike does not conform to the requirements of a protected strike, the employer may take action against the striking employees.²⁰⁷ The employer can claim compensation or damages from the employees or their trade union, if loss or damages attributable to the strike can be proved.²⁰⁸

There is no provision for criminal sanctions against employees who participate in an unprotected strike and the circumstances under which employees would enjoy protection have been indicated above.²⁰⁹ Protection is not provided for strikers who do not conform to the requirements and employees should be mindful that by participating in an unprotected strike they are placing themselves at risk of being dismissed.²¹⁰

Myburgh SC is of the view that the Labour Court will adopt a strict approach in cases where strikers fail to conform to the substantive limitations as provided for in section 65²¹¹ of the LRA.²¹² The Labour Court will further determine if attempts were made or not, to comply with the procedural requirements in terms of section 64 of the LRA.²¹³

²⁰⁷ Tenza op cit (n3)37.

²⁰⁸ Section 68(1)(b) of the LRA. See also Tenza op cit (n3)37.

²⁰⁹ Mawasha op cit (n37)5.

²¹⁰ Mawasha op cit (n37)5. See also in *Modibedi & others v Medupi Fabrication (Pty) Ltd* (2014) 35 ILJ 3171 (LC) at 3193B, the union had embarked on an unprotected strike in contravention of a peace agreement. The court held that their behaviour had made continued employment relationship intolerable. This decision suggest that unprotected strikes and those strikes that are unprotected due to being prohibited in terms of section 65 of the LRA may have far reaching consequences which may include dismissal.

²¹¹ The employees in *New Kleinfontein Goldmine (Pty) Ltd* supra (n141) at paras 49 & 66, the court held that the employees were fairly dismissed for participating in an unprotected strike in breach of the wage agreement as prohibited by section 65(1)(a) of the LRA.

²¹² Myburgh A, "The failure to obey interdicts prohibiting strikes and violence (the implications for labour law and the rule of law)" (2013) 23 *CLL* 9.

²¹³ Myburgh op cit (n212)9.

There is a viewpoint that the Labour Court should start exercising a strict approach in upholding the dismissal of unprotected strikers.²¹⁴ It is stated that is the rationale of differentiating between the two strikes, namely protected and unprotected strikes.²¹⁵ The purpose of the distinction between a protected strike and an unprotected strike is to provide protection to the protected strike.²¹⁶ If non-compliance with these statutory requirements for a protected strike has no adverse consequences, strikers will not be compelled to conform to the requirements for a protected strike.²¹⁷

As mentioned that participating in an unprotected strike has consequences factors which courts and commissioners must take into account provided for in terms of section 68 of the LRA including the requirements of the Code of Good Practice for dismissals when considering compensation dismissal or any appropriate sanction will be discussed in chapter 3 dealing with remedies.

2.5 The Code of Good Practice: Collective Bargaining, Industrial Action and Picketing (the Code for Collective Bargaining).

This Code for Collective Bargaining must not be interpreted as imposing any unconstitutional limitation on the right to strike as provided for in the LRA or applied in a way that undermines the right to strike.²¹⁸

The Code for Collective Bargaining states that the right of workers to strike is constitutionally protected.²¹⁹ The right to strike may be limited by legislation provided that the limitation is reasonable and justifiable.²²⁰

²¹⁴ Botha MM and Germishuys W, The promotion of orderly collective bargaining and effective dispute resolution, the dynamic labour market and the powers of the Labour Court (2017)539.

²¹⁵ Botha and Germishuys op cit (n214)539.

²¹⁶ Botha and Germishuys op cit (n214)539.

²¹⁷ Botha and Germishuys op cit (n214)539.

²¹⁸ The Code for Collective Bargaining item 4.

²¹⁹ The Code for Collective Bargaining item 16(1).

²²⁰ The Code for Collective Bargaining item 16(2).

The Code for Collective bargaining recognizes that, the right to strike is a right to cause economic harm in order to put pressure to the employer to accede to certain demands.²²¹ The Code for Collective Bargaining also recognizes that prolonged and violent strikes have a serious detrimental effect on the strikers, their families, the small businesses in the community where those strikers live, the employer and the economy.²²² Workers exercising the right to strike must therefore recognize the constitutional rights of others.²²³

In order to encourage compliance with Chapter IV of the LRA, recognize the rights of others and deter unlawful conduct during industrial action the Code for Collective Bargaining requires parties to develop rules regulating peaceful pickets and strikes.²²⁴ Parties may also consider establishing peace and stability committee.²²⁵

In recognizing the constitutional rights of others it may be useful to conduct a ballot to determine the weight of those employees in favour of the strike against those who are not in favour of it. At Nkomati, the National Union of Mineworkers (NUM) is the only trade union with organisational rights and has a constitution which provides for a ballot before embarking in a strike. Clause 18.1 of the NUM Constitution provides that before calling a strike the union's Leadership should approve the strike and the relevant Regional Committee must conduct a ballot of those of its members in respect of whom it intends to call the strike.²²⁶ It is important to note that at this juncture the NUM's constitution does not provide that the ballot be conducted in secret and thus do not comply with the requirement of section 95(5) (p) of the LRA.²²⁷

The Code for Collective bargaining will be further explored in Chapter 4. Picketing will be discussed in the following section.

²²¹ The Code for Collective Bargaining item 16(3).

²²² The Code for Collective Bargaining item 16(4).

²²³ The Code for Collective Bargaining item 16(5).

²²⁴ The Code for Collective Bargaining item 23(1).

²²⁵ The Code for Collective Bargaining item 23(1).

²²⁶ The Constitution of the National Union of Mineworkers of 2011.

²²⁷ The Code for Collective Bargaining item 19(2).

2.6 Picketing

This section will briefly look into the legislation that regulates picketing. Section 17 of the Constitution provides that ‘everyone has a right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.’²²⁸

Section 69 of the LRA, regulates the right of trade union members and supporters of a registered trade union to picket and the Code of Good Practice on Picketing (Code on Picketing). is intended to provide practical guideline on picketing to parties.²²⁹ Even though the Code on Collective Bargaining that was discussed earlier also deals with picketing, it will not be discussed in this section again.

It is often in the context of pickets that strike violence, intimidation and other unlawful activities happens. Therefore, it is necessary to discuss picketing as a corollary to strikes. The right to picket is strongly connected to the right to strike.²³⁰ Both pickets and strike have the same primary objective that is, to exert pressure on the employer to accede to certain demands from workers. Both actions may have adverse consequences to the employer’s business. During strikes employers suffer production loss and during picketing employers suffer profit loss, due to the apprehension of an unsafe environment from customers during picketing. Customers tend to spend their money in other businesses, to ensure that they are safe from picketers. Some customers also show empathy to the picketers and spend their money in other businesses.

The recognition of the right to picket also reflects the commitment to constitutional rights of freedom of assembly²³¹ and freedom of expression.²³² Pickets aim to persuade fellow

²²⁸ Section 17 of the Constitution.

²²⁹ Item 1(1) of the *Code of Good Practice on picketing*.

²³⁰ du Toit et al. op cit (n29)365.

²³¹ Section 17 of the Constitution.

²³² Section 16 of the Constitution.

workers to join the strike.²³³ Replacement workers are persuaded whether voluntarily or by duress in a form of intimidation or assault by striking workers not to take up their positions whilst they are on strike. Suppliers and customers are also sometimes persuaded to boycott the employer.²³⁴

Pickets are regulated in terms of the provisions of section 69 of the LRA.²³⁵ Thus, a picket will be unprotected if the employees fail to comply with these provisions.²³⁶ The right to picket may be exercised by members of a trade union in support of a protected strike and the said picket must be authorized by a registered trade union.²³⁷

Supporters of the trade union may also join the picket.²³⁸ It is however important to be mindful that members of the trade union and their supporters cannot picket without picketing rules being in place.²³⁹ This suggest Nkomati and their trade union NUM must conclude a collective agreement on picketing rules. If Nkomati and NUM fail to conclude an agreement on picketing rules in terms of section 69(4) of the LRA, then the CCMA must establish those picketing rules as provided for in terms of section 69(5) of the LRA.²⁴⁰ The CCMA must ensure that all the requirements in terms of section 69 of the LRA have been complied with before issuing these picketing rules to parties.²⁴¹

Section 69(1) of the LRA further provides that the picketing members of the relevant trade union and its supporters may (only) peacefully demonstrate in support of a protected strike;²⁴² this is in line with section 17 of the Constitution which requires picketers to conduct themselves peaceful, lawful and unarmed.²⁴³ The picket may not interfere with

²³³ du Toit et al. op cit (29)365.

²³⁴ du Toit et al. op cit (29)365.

²³⁵ The LRA.

²³⁶ Tenza op cit (n3)45.

²³⁷ du Toit et al. op cit (29)366.

²³⁸ Section 69(1) of the LRA.

²³⁹ Item 4(1) Code on Picketing.

²⁴⁰ The LRA.

²⁴¹ The LRA.

²⁴² The LRA.

²⁴³ The Constitution.

the constitutional rights of other persons therefore.²⁴⁴ Acceptable picketing behaviours are as follows: picketers carrying placards; chanting slogans; singing and dancing.²⁴⁵ Picketers must conduct themselves lawfully.²⁴⁶ The employer may not take disciplinary action against workers for participating in a lawful picket but the employer may take action for misconduct committed during a picket.²⁴⁷ This suggest that employees picketing unlawfully can be dismissed for misconduct.²⁴⁸ Such employees may be held civilly liable for the damages caused by a picket.²⁴⁹

Despite the purpose of a picket to peacefully encourage non-striking employees and members of the public to support strikers involved in a protected strike,²⁵⁰ there have been instances where picketing has turned violent, requiring the courts to intervene.²⁵¹

While this will be discussed in detail in Chapter 4, for Nkomati to encourage peaceful pickets, it should strongly consider concluding a collective agreement with a trade union containing picketing rules, with the objective of promoting orderly pickets free from violence, intimidation and any unlawful activities. The trade union should ensure that their members adhere to the collective agreement and that their members and supporters refrain from committing any conduct contrary to the agreement. Nkomati should ensure that contravention of the agreement attracts adverse consequences and that the agreement is only applicable during protected strikes. Picketing in support of an

²⁴⁴ Item 6(5) of the Code on Picketing. See also *Growthpoint Properties Ltd v SA Commercial Catering & Allied Workers Union & others* (2010) 31 ILJ 2539 (KZD).

²⁴⁵ Item 6(6) Code on Picketing.

²⁴⁶ Item 7(b) Code on Picketing.

²⁴⁷ Item 8(2) Code on Picketing.

²⁴⁸ Item 8(2) Code on Picketing.

²⁴⁹ Item 8(1) Code on Picketing.

²⁵⁰ Item 3(1) Code on Picketing.

²⁵¹ *Tsogo Sun Casinos (Pty) Ltd* supra (n25) at 1003J – 1004A, the court stated that, “this court will always intervene to protect both the right to strike and peaceful picketing. This is an integral part of the court’s mandate conferred by the Constitution and the LRA. But the exercise of the right to strike is sullied and ultimately eclipsed when those who purport to exercise it engage in acts of gratuitous violence in order to achieve their ends. When the tyranny of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy protected status.”

unprotected strike must also attract adverse consequences in order to deter such conduct.

2.7 Nkomati's Grievance Procedure

Nkomati has a grievance procedure in place, a tool that assists employees to address their dissatisfaction with the employer. The grievance procedure also provides relief for a group grievance. For instance, dissatisfaction with short term incentive payments or non-payment by a group of employees may be addressed in terms of this process. The grievance procedure seeks to speedily resolve grievances with specific time frames. The employer has five working days to resolve the grievance. The grievance procedure further provides that if the grievance remains unresolved, parties may refer the matter to the CCMA.

Nkomati trade union representatives were simply required to follow the grievance procedure and if the issue in dispute could not be resolved, the trade union would declare a dispute and refer the matter to the CCMA. The process to ensure that Nkomati employees embark on protected strikes is not complex. Employees continue to ignore the simple processes and embark on unprotected strikes with adverse consequences. Nkomati also faces adverse consequences due to production loss resulting from unprotected strikes. Protected strikes would allow Nkomati to either accede to or reject employees' demands particularly during the pre-strike procedures. Protected strikes would further allow Nkomati to put contingency plans in place to mitigate adverse consequences of the strike.

2.8 Conclusion

It is clear that for a strike to be protected it has to meet certain procedural requirements.²⁵² In South Africa, these requirements and procedures are provided for in the LRA.²⁵³ The right to strike is internationally recognized.²⁵⁴ The right to strike is provided for in section

²⁵² Tenza op cit (n3)289.

²⁵³ Mawasha op cit (n37)20.

²⁵⁴ du Toit et al. op cit (29)333.

23 of the constitution as well as in section 64 of the LRA.²⁵⁵ The eligibility to strike is much wider in the constitution than it is in the LRA, since the constitution provides that 'every worker' whereas the LRA provides that 'every employee'.²⁵⁶ Section 64 of the LRA stipulates the procedural requirements to be followed for a protected strike.²⁵⁷ Section 65 of the LRA outline the substantive limitations on the right to strike.²⁵⁸ These include issues in dispute over which employees are prohibited from embarking on a strike or in furtherance of a strike and those employees who are prohibited from striking such as employees engaged in an essential service or a maintenance service.²⁵⁹

The purpose of the statutory requirements is to provide the trade union and/or employees and the employer with an opportunity to conciliate and where possible settle their dispute.²⁶⁰ It also allows the employer to prepare for the looming strike that may take place.²⁶¹ A strike which does not conform to the provisions of the LRA shall therefore be declared unprotected with adverse consequences.²⁶²

Employees are also required to picket peacefully in support of a protected strike. Unlawful activities in the picketing line may have far reaching consequences for workers.

As earlier mentioned Nkomati employees or their trade union NUM did not follow the procedural requirements provided for in the LRA to exercise their Constitutional right to strike. Therefore, Nkomati employees participated in an unprotected strike. Regretfully, during their strike they also committed misconduct by damaging Nkomati property and intimidating other fellow employees.

The LRA also gives remedies as to how to deal with an unprotected strike and unlawful conduct during the strike.²⁶³ Chapter 3 deals with remedies for unprotected strikes.

²⁵⁵ Mbona op cit (n1)70.

²⁵⁶ Mbona op cit (n1)11.

²⁵⁷ Mbona op cit (n1)20.

²⁵⁸ Mbona op cit (n1)20.

²⁵⁹ Mbona op cit (n1)20.

²⁶⁰ Mbona op cit (n1)67.

²⁶¹ The Code for Collective Bargaining item 20(2).

²⁶² Mawasha op cit (n37)20.

²⁶³ Mawasha op cit (n37)20.

Chapter 3

REMEDIES

3.1. Introduction

The current labour law dispensation discourages unprotected strikes and unlawful conduct during strikes whether the strikes are protected or unprotected, by providing remedies to the employer.²⁶⁴ The LRA grants protection to employees who participate in a protected strike.²⁶⁵ As mentioned in Chapter two, the protection only applies if the substantive and procedural requirements set out in Chapter IV of the LRA have been complied with.²⁶⁶

This protection does not suggest that the employees may engage in unlawful activities and that employers do not have any recourse during a strike, particularly during an unprotected strike.²⁶⁷ Participating in an unprotected strike has adverse outcomes for employees.²⁶⁸ The hostility that develops between the unprotected strikers and their fellow employees whom are non-strikers has a detrimental effect; strikes are calculated to cause harm, not only to the employer, but sometimes also to non-striking employees and even customers and suppliers.²⁶⁹ The same hostility extends to the employer which generally takes a long time to heal.²⁷⁰ This hostility will not assist in achieving positive organizational outcomes.

An employer faced with an unprotected strike has recourse to lock-outs in terms of section 64 of the LRA.²⁷¹ However, locking out employees may further create hostility between

²⁶⁴ Section 68(1) of the LRA.

²⁶⁵ *NUMSA obo Khanyile Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others* [2019] ZACC 25 at para 1.

²⁶⁶ Section 67 of the LRA. See also Achmat op cit (n122)2.

²⁶⁷ du Toit et al. op cit (29)355.

²⁶⁸ Section 68(5) of the LRA. See also Achmat (n122)33.

²⁶⁹ *Dunlop CC 2019 supra* (n265) at 2.

²⁷⁰ Mawasha op cit (n37)21.

²⁷¹ Section 64(1) of the LRA. See also Mawasha (n37)21.

parties. A lock-out is an economic weapon that is used by the employer during the collective bargaining process to compel a trade union or employees to accept or submit to a particular demand.²⁷² In order for a specific action to qualify as a lock-out, the exclusion of employees from the workplace must be accompanied by a demand related to a matter of mutual interest between the employer and the employee.²⁷³ Certain requirements as outlined in section 64 and section 65 of the LRA need to be complied with, in order for the employer to exercise this recourse.²⁷⁴ The lock-out should also comply with the definitional requirements in section 213 of the LRA.

As mentioned earlier, Nkomati employees participated in an unprotected strike to compel the employer to accede to their demand, thus Nkomati was not expected to comply with statutory requirements since the lock-out would be in response to an unprotected strike in terms of the provisions of section 64(3)(d) of the LRA.²⁷⁵

Dismissal is another option available to employers dealing with a strike not in compliance with the requirements of a protected strike.²⁷⁶ The consequences for participating in such a strike is that the action may constitute a fair reason to dismiss workers.²⁷⁷ Participation in an unprotected strike is treated as a form of misconduct.²⁷⁸ Though it cannot be justified to dismiss employees for misconduct for having participated in an unprotected strike without following required processes that is, procedural and substantive fairness.²⁷⁹ Schedule 8 of the Code of Good Practice: Dismissal (the Code) of the LRA provides guidelines to employers on how to deal with employees who take part in strikes that do not conform to procedural and substantive fairness.²⁸⁰ These guidelines are provided for by item 6 of the Code, and will be discussed in detail later in this Chapter. Under the current dispensation it is not sufficient to rely on common law in dismissing employees

²⁷² Section 213 of the LRA.

²⁷³ Mawasha (n37)21.

²⁷⁴ Mawasha (n37)21.

²⁷⁵ The LRA.

²⁷⁶ Mawasha (n37)21.

²⁷⁷ Section 68(5) of the LRA. See also Mawasha (n37)21.

²⁷⁸ Venter and Levy op cit (n114)556.

²⁷⁹ Mawasha (n37)31.

²⁸⁰ Mawasha (n37)21.

participating in an unprotected strike.²⁸¹ It would constitute an unfair dismissal as provided for in terms of section 188 of the LRA where it stipulates that “a dismissal that is not automatically unfair, is unfair if the employer fails to prove that the reason for dismissal is a fair reason and that the dismissal was effected in accordance with a fair procedure.”²⁸²

3.2 Remedies for unprotected strikes and unlawful activities during strikes

3.2.1 Interdict

A strike that does not comply with the substantive and procedural requirements of the LRA is unprotected and thus may be interdicted.²⁸³ Section 68(1)(a) of the LRA provides that the Labour Court has exclusive jurisdiction to interdict any person from participating in an unprotected strike or in conduct in support of the strike.²⁸⁴ An interdict is one of the available remedies to an employer to prevent damage or harm caused by the wrongful or unlawful activities of striking employees.²⁸⁵ Reverting to the unprotected strike at Nkomati, the employer regrettably did not apply for an interdict. At that juncture Nkomati management thought it would resolve the strike through engagements together with the union leadership.

The employer often applies to the court, on an urgent basis, to obtain an interdict to restrain the striking employees and prevent them from continuing with their wrongful and/or unlawful actions.²⁸⁶ The LRA provides that at least a 48-hour notice must be given to the employees or to the trade union specifying the employer’s intention to apply for an interdict against the strike action, although courts may permit a shorter period if the union has been given a reasonable opportunity to be heard before a decision concerning that application is taken and that the employer gives a reasonable justification or show good cause why a court should permit a shorter period.²⁸⁷

²⁸¹ Mawasha (n37)22.

²⁸² See also Item 2(1) of Schedule 8 of the Code of Good Practice: Dismissal to the LRA 66 of 1995.

²⁸³ Section 68(1)(a)(i) of the LRA.

²⁸⁴ The LRA.

²⁸⁵ Mohale op cit (n23)84.

²⁸⁶ *RAM Transport (SA) (Pty) Ltd* supra (n206) at 9. See also Tom (n22)12.

²⁸⁷ Section 68(2) of the LRA. See also Tom (n22)12.

In *National Council of Societies for the Prevention of Cruelty to Animals (SPCA) v Open shore*, the Supreme Court of Appeal set out the requirements for obtaining an interdict as follows:

- 'A prima facie or clear right, what is required here is proof of facts that establish the existence of a right in terms of substantive law;
- A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
- The balance of convenience favours the granting of an interim interdict;
- The applicant has no other satisfactory remedy.'²⁸⁸

In applying the above requirements for obtaining an interdict to the situation described in Chapter 1 at Nkomati, firstly, the strike was unprotected. Secondly, the strikers prevented vehicles and persons from entering or leaving the premises, intimidated people, and damaged and torched property. Therefore, it is the author's view that Nkomati would have met the requirements to obtain an interdict if the application was pursued.²⁸⁹ The Open shore case above clearly illustrates that the courts will not glibly grant applicants interdicts without satisfying certain requirements.

An interdict can only be effective if the court order is complied with, by the union and/or its members.²⁹⁰ The Labour Court must regard the disobedience of court orders by employees taking part in unprotected strike actions as a severely aggravating factor during contempt of court applications.²⁹¹ This is necessary because of the fact that court orders are not treated with the respect they ought to command.²⁹² This tendency may be effectively discouraged by the courts indicating reluctance to condone non-compliance by striking employees who perpetrate unlawful conduct.²⁹³ Myburgh SC's preference for a strict approach when dealing with parties who disobey court orders is necessary, in order

²⁸⁸ *National Council of SPCA v Open shore* 2008 (5) SA 339 SCA, at para 20.

²⁸⁹ *Hotz and Others v University of Cape Town* [2016] ZASCA 159; [2016] 4 All SA 723 (SCA); 2017 (2) SA 485 (SCA) at para 29.

²⁹⁰ Achmat (n122)45.

²⁹¹ Botha and Germishys op cit (n214)539.

²⁹² Botha and Germishys op cit (n214)540.

²⁹³ Botha and Germishys op cit (n214)540.

to ensure obedience to court orders, as this is foundational to a state based on the rule of law.²⁹⁴ Non-compliance should be penalized.²⁹⁵

With the aforesaid it is necessary to discuss the consequences of not heeding to court interdicts or orders. Failure to obey an interdict amounts to contempt of court.²⁹⁶

3.2.1.1 Contempt of court

A contempt of court application can be applied for, if striking employees fail to comply with an interdict.²⁹⁷ The legal principles with regard to contempt proceedings have been summarized in *Fakie NO v CCII Systems (Pty) Ltd*, the SCA held as follows:

“(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.

(b) The respondent in such proceedings is not an ‘accused person’, but is entitled to analogous protections as are appropriate to motion proceedings.

(c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and *mala fides*) beyond reasonable doubt.

(d) But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and *mala fides*: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established beyond reasonable doubt.

(e) A declarator and other appropriate remedies remain available to a civil applicant on proof of a balance of probabilities.”²⁹⁸ What follows is a discussion of these principles in the context of relevant case law.

²⁹⁴ Myburgh op cit (n212) 9. See also Botha and Germishys op cit (n214)540.

²⁹⁵ Botha and Germishys op cit (n214)540.

²⁹⁶ *Fakie NO v CCII Systems (Pty) Ltd* (2006) 4 SA 326 (SCA) at 333E.

²⁹⁷ Mohale op cit (n23)87.

²⁹⁸ *Fakie* supra (n296) at 42. *These principles were further restated by the Labour Appeal Court in FAWU v In2Food (Pty) Ltd* (2014) 35 ILJ 2767 (LAC) at para 9.

The seriousness of contempt was demonstrated in the matter between *Security Services Employers' Organisation and Others v South African Transport and Allied Workers Union and Others*, where trade union members were involved in a protected national strike which engendered horrific incidents of violence and vandalism which resulted in several persons being injured, being murdered, private and public property being damaged, destroyed and huge financial losses, as a result the employers instituted two contempt of court applications.²⁹⁹

The Court issued two rules *nisi* pursuant to two applications respectively instituted by the employers against the trade union.³⁰⁰ The employers have also instituted applications against the trade union for the contempt of the Court Orders respectively issued (two rules *nisi*) in both cases.³⁰¹

The employers further instituted an application (the main application) against the trade union, interdicting and restraining the trade union and its members from intimidating, harassing and/ or assaulting non striking employees.³⁰² The Labour Court held that, the employers have demonstrated that the trade union and its members were in contempt of Court Orders before the rules *nisi* were discharged.³⁰³

The court noted that the purpose of contempt proceedings is to compel compliance with an order of court against any party, in order to vindicate the court's honour resulting from disregard of its order.³⁰⁴ The court ordered the trade union to pay a fine of R500 000 for contempt of the terms of the court orders that were suspended for five years.³⁰⁵ Eleven members of the trade union were sentenced to a period of six months imprisonment, suspended for five years.³⁰⁶

²⁹⁹ *Security Services Employers' Organisation and Others v SA Transport and Allied Workers Union and Others* (2007) 28ILJN1134 (LC) at para75.

³⁰⁰ *Security Services Employers'* supra (n299) at 1.

³⁰¹ *Security Services Employers'* supra (n299) at 3.

³⁰² *Security Services Employers'* supra (n299) at 9.

³⁰³ *Security Services Employers'* supra (n299) at 85.

³⁰⁴ *Security Services Employers'* supra (n299) at 15.

³⁰⁵ *Security Services Employers'* supra (n299) at 87.

³⁰⁶ *Security Services Employers'* supra (n299) at 87.

The Labour Appeal Court in *North West Star (Pty) Ltd v Serobatse*, stated that:

‘The correct principle is that, if a court has issued an order against you and you are unhappy with it, you must take that decision to a court higher than the one that issued such order and which has competent appellate or review jurisdiction and seek to have such order set aside. If there is no such court, for example, where there is no appeal or review available against that court or against such order or if the court which issued the order is the court of final jurisdiction in such matters or is the highest court in the land, then you have no choice but must simply comply with the order. A person cannot say: “I don’t like this court order; it is wrong; therefore I will not comply with it.” If we want to deepen our democracy, promote the rule of law, discourage self-help and encourage those who have disputes to take them to the courts of the land and not to seek to resolve them through physical fights or violence, the whole society must frown upon anyone who disobeys an order of court or who, either by word or deed, encourages or incites another or others to disobey an order of court.’³⁰⁷

In addition, on the issue of contempt of court, the highest court in South Africa in *Betafence South Africa (Pty) Ltd v NUMSA* raised its concern with reference to the disregard for court orders because the striking employees “simply do not like them”.³⁰⁸ The constitutional court was aware of the fact that this disregard towards court orders is often aggravated and motivated by trade unions.³⁰⁹ Where striking employees refuse to heed court orders even on the advice of their trade union leadership, the most severe consequences would seem to be justified and that the non-compliance to court orders by those striking employees would be seen as indeed “willful and *mala fide*.”³¹⁰

³⁰⁷ *North West Star (Pty) Ltd (Under Judicial Management) v Serobatse* (2005) 26 ILJ 56 (LAC) at para 18.

³⁰⁸ *Betafence South Africa (Pty) Ltd v NUMSA* C194/2016 at para 54.

³⁰⁹ *Betafence SA* supra (n308) at 54.

³¹⁰ *Betafence SA* supra (n308) at 54. See also Botha and Germishys op cit (n214)547.

3.2.2 Compensation

First and foremost, it should be clarified that compensation and damages are two different claims. The compensation claim falls within the prescripts of the LRA as provided for in section 68.³¹¹ The claim for damages is a claim based on common law principles in terms of the law of delict, in addition damages may also arise out of contract law.³¹² A delict is an actionable civil wrong, where a person causes harm to another resulting in suffering a loss.³¹³

Section 68(1)(b) of the LRA provides that 'the labour court has exclusive jurisdiction to order the payment of just and equitable compensation for any loss attributable to the strike.'³¹⁴ This section may be an effective deterrent to curb losses resulting from a strike and employers must use it to claim compensation from trade unions where strikes are unprotected and are marred by violence, vandalism and disruption resulting in losses.³¹⁵ The court in *Rustenburg Platinum Mines Ltd v The Mouthpiece Workers Union*, held that the words 'just and equitable mean no more than that compensation awarded must be fair.'³¹⁶ According to du Toit et al, certain requirements must be satisfied before compensation can be considered in relation to a strike that is,

- (a) 'the strike must be in contravention of Chapter IV;
- (b) the applicant must establish that it sustained loss in consequence of the strike; and
- (c) it must show that the respondent had participated in the strike.'³¹⁷

³¹¹ The LRA.

³¹² Mohale op cit (n23)59.

³¹³ M Loubser et al. The law of delict in South Africa: Private law 2ed (2012) 7. See also Mbona op cit (n1) 35.

³¹⁴ The LRA.

³¹⁵ Gcume op cit (n21)62.

³¹⁶ *Rustenburg Platinum Mines Ltd v The Mouthpiece Workers Union* (2002) 1 BLLR 84 (LC) at 2036E. See also Tom op cit (n22)15.

³¹⁷ du Toit et al. op cit (n29)360.

In terms of the provisions of section 68(1)(b) of the LRA, in determining whether the court may grant such compensation and the amount to be awarded, the court must have regard to certain factors, namely:

- whether the trade union made attempts to comply with the law and the extent of such attempts;
- if any, whether there was premeditation before the strike took place;
- whether the strike action by employees was a response to the employer's unjustified conduct; and
- whether the trade union complied with an earlier interdict or a court order.³¹⁸

However, these factors are not an exhaustive list of everything that needs to be or may be considered by the court. In determining whether the order of compensation is just and equitable, the court will consider other factors which it deems necessary in the circumstances.³¹⁹

In *Algoa Bus Company v South African Transport & Allied Workers Union (SATAWU) & others* the company made an application in terms of section 68(1)(b) of the LRA. The employer sought an order declaring that the employees are indebted to it in the amount of R465 001,34 plus interest for damages arising from an unlawful strike and directing the employees to pay that amount.³²⁰

The Labour Court confirmed the *Rustenburg Platinum Mines Ltd* decision and held that the words "just and equitable" in the LRA means no more than that compensation awarded must be fair.³²¹ Section 68(1)(b) providing for compensation for unprotected strike action was designed to compensate an aggrieved party for losses actually suffered.³²² However, compensation need not necessarily do so.³²³

³¹⁸ The LRA. See also Tom op cit (n22)15.

³¹⁹ Tom op cit (n22)15.

³²⁰ *Algoa Bus Company v SATAWU & others* [2010] 2 BLLR 149 (LC) at para 1

³²¹ *Algoa Bus* supra (n320) at 44.

³²² *Algoa Bus* supra (n320) at 44.

³²³ *Algoa Bus* supra (n320) at 44.

The court further stated that, the strike lasted for sixteen hours and not for two days as submitted by the employer.³²⁴ The court then ordered the trade union and employees to pay the company the sum of R100 000 in monthly instalment of R50 jointly and severally.³²⁵

In addition to the remedies above, Nkomati may take disciplinary action against those employees who participated in the unprotected strike. In addition take disciplinary action against those employees who committed unlawful activities during the strike.

3.2.3 Damages

Where unlawful acts have been committed during the strike, the common law permits the employer to have a delictual claim against the trade union or employees for the damage caused during the strike action whether protected or unprotected.³²⁶ The law of delict has a vital role to play in protecting constitutional rights of victims such as, employers and third parties of unlawful and culpable actions.³²⁷ There are hurdles for the employer before succeeding in delictual claims. In order to hold the trade union liable, the employer must establish that the wrongdoer is a member of the trade union or otherwise authorized to act on behalf of the trade union.³²⁸ The trade union can also be held liable in delict for losses suffered as a result of an unprotected strike.³²⁹

In order to succeed with a delictual claim, the employer or third party must establish patrimonial loss caused by an unlawful conduct accompanied by *culpa* in the form of either an intentional or negligent act or omission by another party, in this case the striking employees.³³⁰ If these requirements are met, the employer or third party (at common law)

³²⁴ *Algoa Bus* supra (n320) at 45.

³²⁵ *Algoa Bus* supra (n320) at 45.

³²⁶ PAK le Roux 'Claims for compensation arising from strikes and lockouts' (2013) 23(2) *Contemporary Labour Law* 11. See also Tenza op cit (n3)124.

³²⁷ *Fose v Minister of Safety and Security* (1997) 3 SA 786 (CC) at 818. See also Tom op cit (n22)27.

³²⁸ Tenza op cit (n3)124.

³²⁹ Tenza op cit (n3)124.

³³⁰ *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 496 – 497. See also Tenza op cit (n3)125.

is entitled to recover the full loss suffered.³³¹ However, the courts have often tempered with this approach, with reference to factors like the sustainability of the collective bargaining relationship between the trade union and the employer, the chilling effect on the right to strike and the ability of the union to continue functioning if a substantial sum must be paid by it to the employer (or a third party).³³²

Delict is not only limited to unprotected strikes, in *Mondi Ltd v Chemical Energy Paper Printing Wood & Allied Workers Union*, the court held that liability for damages during a protected strike is permissible, but it should not too readily be attributed to the trade union. One first has to prove the vicarious liability of the trade union.³³³ This is a complex hurdle to overcome by employers, to prove the commission of unlawful conduct and who did it.³³⁴

In *Xstrata South Africa v AMCU and others*, it is suggested that the mere taking of steps to prevent damage from taking place without stopping the unlawful conduct will not be sufficient to exempt the union from liability.³³⁵ The court held that:

‘when a union calls upon its members to take part in strike action this will lead to further activities associated with the strike including marches, demonstrations and handing over of petitions. Section 17 of the constitution places an obligation on them to do so peacefully and unarmed. By implication, the same obligation is placed on the trade union to ensure that its members indeed exercise these rights likewise, and within the confines of other laws.’³³⁶

³³¹ *Mondi Ltd (Mondi Kraft Division) v CEPPWAWU & others* (2005) 26 ILJ 1458 (LC) at 1468. See also Tom op cit (n20)32.

³³² *Algoa Bus Company v SATAWU and Others* (2015) 36 ILJ 2292 (LC) at 2296J-2297A.

³³³ Tenza op cit (n3)236. See also Tom op cit (n20)3.

³³⁴ *Mondi* supra (n331) at 1470I-J.

³³⁵ Tenza op cit (n3)294.

³³⁶ *Xstrata South Africa (Pty) Ltd v AMCU and Others* (J1239/13) [2014] ZALCJHB 58 at para 36.

This suggests that the trade union must strive to do whatever possible to prevent unlawful acts during a strike.³³⁷ If it fails to discharge these obligations resulting in unlawful conduct such as damage to property, the trade union should be held liable, as it would have failed to discharge its duty of promoting (and even ensuring) peaceful action in terms of section 17 of the constitution.³³⁸

In addition to claiming compensation and damages, Nkomati can institute disciplinary action against employees for misconduct committed during a strike, as discussed earlier.

3.2.4 Disciplinary action

3.2.4.1 Disciplinary action for participating in an unprotected strike

Employers are allowed to take disciplinary action short of dismissal against those employees who participate in strikes that does not comply with Chapter IV of the LRA. The LRA also permits employers to take disciplinary action against employees for misconduct committed during a strike, whether or not that strike is protected.³³⁹ Therefore strikes must be free of misconduct.³⁴⁰ The misconduct referred to and discussed below will include unlawful conduct by strikers such as, intimidation, damage to property and assault. Incidents of physical assault were not reported at Nkomati; however assault incidents are prevalent during unprotected strikes and therefore it is necessary to discuss assault during strikes in this context.

When taking disciplinary action, the employer must be mindful of the provisions of item 6 of the Code.³⁴¹ The Labour Court had this to say about item 6 of the Code:

³³⁷ *Xstrata SA* supra (n336) at 36.

³³⁸ *Xstrata SA* supra (n336) at 36. See also *Tenza* op cit (n3)126.

³³⁹ *Grogan* op cit (n113)553.

³⁴⁰ *Mohale* op cit (n21)60.

³⁴¹ The Code of Good Practice: Dismissal. See also *Mohale* op cit (n23)60.

In *FAWU v La Visagie & Seun*, the court confirmed *NUMSA v CBI Electric* position and stated Grogan's view that "item 6 of the Code is not, and does not purport to be, exhaustive or rigid but merely identifies in general terms some factors that should be taken into account in evaluating the fairness of a strike dismissal. He opines that in determining substantive fairness regard should also be had to other factors including the duration of the strike, the harm caused by the strike, the legitimacy of the strikers' demands, the timing of the strike, the conduct of the strikers and the parity principle. The court agrees with this view as the consideration of the further factors ensures that the enquiry that is conducted to determine the fairness of the strike-related dismissal is much broader and is not confined to the consideration of factors set out in item 6 of the Code."³⁴²

Nkomati employees committed misconduct by participating in a strike that did not comply with all the procedural requirements.³⁴³ There was no referral of any of the demands made to conciliation, and there was no strike notice, thus rendering the strike unprotected. Fortunately, Nkomati employees' participation in the unprotected strike resulted in disciplinary short of dismissal, even though the LRA allows for dismissal. The next section will deal with dismissals for participating in unprotected strikes. In addition deal with misconduct committed during strikes with a focus to misconduct committed by Nkomati employees. It is important to emphasize that these types of misconduct are prevalent during strikes in other organizations as well.

Having discussed disciplinary action above it is also necessary to briefly discuss the importance of a pre-dismissal hearing.

³⁴² *FAWU and Others v La Visagie and Seun* (JS831/13) [2017] ZALCJHB 288 at para 85.

³⁴³ Tom op cit (n22)26.

3.2.4.2 Pre-dismissal hearing

The significance of hearings before dismissing the strikers should not be underemphasized in circumstances when dealing with the dismissal or contemplating dismissal of employees for participating in an unprotected strike.³⁴⁴ Primarily, the hearing will assist to determine the reasons for the employees' continued unprotected action even when an ultimatum had been issued.³⁴⁵ It is wise for the parties to always have an opportunity to hear each other's side.³⁴⁶

Having heard the employees' reasons for participating in an unprotected strike, the employer may decide that the appropriate sanction is a dismissal. This will be discussed in the section that follows.

3.2.4.3 Dismissal for participating in unprotected strike

As mentioned in Chapter 2, employees participating in unprotected strikes may be dismissed. Under the common law, a strike is a fundamental breach of the employment contract, permitting the employer with powers to dismiss the employee for withdrawal of labour with immediate effect.³⁴⁷ However, since the enactment of the LRA, an employee cannot be dismissed solely by reason of having participated in a protected strike without following the required processes.³⁴⁸ Section 68(5) allows dismissal for participating in an unprotected strike. It provides: "Participation in a strike that does not comply with the provisions of this Chapter, or conduct in contemplation or in furtherance of that strike,

³⁴⁴ Mawasha op cit (n37)26.

³⁴⁵ Mawasha op cit (n37)27. See also *SACCAWU obo Mokebe and Others v Pick 'n Pay Retailers (JA36/16)* [2017] ZALCJHB 345 (26 September 2017) at para 37.

³⁴⁶ See *Modise and Others v Steve's Spar Blackheath* [2000] ZALAC 1; (2000) 21 ILJ 519 (LAC), at para 96, the court confirmed the applicability of the *audi alteram partem* principle in the context of a dismissal effected pursuant to an unprotected strike.

³⁴⁷ Mohale op cit (n23)58.

³⁴⁸ Grogan op cit (n113)553. See also Mohale op cit (n23)59.

may constitute a fair reason for dismissal. In determining whether or not the dismissal is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account.”³⁴⁹

Item 6(1) of the Code provides that: “Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal.”³⁵⁰ The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case.”³⁵¹

The court in *Association of Mineworkers and Construction Union (AMCU) and Others v Australian Laboratory Services (Pty) Ltd* explained the relationship between item 6(1) of the Code, which deals with non-compliance with statutory requirements before embarking in a strike, and item 6(2) of the Code, which deals with the employer’s response to the unprotected strike.³⁵² The court said as follows:

‘Item 6, attempts to encapsulate important aspects of the respective conduct of the employer and employee parties in the course of the strike which must be considered in deciding whether any ensuing dismissals were substantively fair or not. Item 6 (1) is concerned with the extent to which strikers, and by implication any union they belong to, have departed from the legal requirements for protected strike action and how they conducted themselves during the strike itself. Item 6 (2) is concerned with the extent to which the employer party gave strikers a reasonable opportunity to abandon their unprotected action. Unfortunately, the object of the guidelines has often been lost sight of by parties engaged in unprotected strike conflicts and there is a tendency for both parties to focus on whether the employer formally complied with item 6 (2) since this is often the easiest factual question to evaluate and is one of the important requisites for a fair dismissal of unprotected strikers. Similarly, there is a tendency to ignore the extent

³⁴⁹ The LRA.

³⁵⁰ *NUMSA and Others v Atlantis Forge (Pty) Ltd (LC308/03) [2005] ZALC 13; [2005] 12 BLLR 1238 (LC) at para 119.*

³⁵¹ The Code of Good Practice: Dismissal.

³⁵² Mohale op cit (n23)99.

to which workers or the union party makes any meaningful efforts to end the unprotected strike, because item 6 (1) tends to emphasise the non-compliance with the statutory requirements for commencing strike action. In focusing in a checklist fashion on these factors, an underlying concern of item 6, which is to evaluate how both parties dealt in good faith with resolving the unprotected strike action is sometimes lost sight of.³⁵³

In contemplating a dismissal of striking employees for misconduct, both procedural and substantive fairness has to be ensured, with reference to item 6 of the Code.³⁵⁴ In *Mzeku & Others v Volkswagen SA (Pty) Ltd*, the Labour Appeal Court had this to say about substantive fairness:

‘In a case such as this one where employees are dismissed because they refuse to work, the substantive fairness of the dismissal means that the conduct for which the employees are dismissed is unacceptable (or is conduct which constitutes a material breach of the employment contract) and for which dismissal is a fair sanction. Where the conduct for which the employees are dismissed is unacceptable but the sanction of dismissal is, in all the circumstances, not a fair sanction, the dismissal cannot be said to be substantively fair. Obviously, where it is found that the conduct for which the employee has been dismissed is unacceptable conduct or where it is found that the employee is not guilty of the unacceptable conduct for which he was dismissed, the dismissal cannot be said to be substantively fair.’³⁵⁵

In *National Union of Metalworkers of South Africa (NUMSA) & others v Atlantis Forge (Pty) Ltd*, the Labour Court held that the employees’ dismissal may have been justified, but for the fact that the strike was not particularly disruptive, damaging or unruly.³⁵⁶ Therefore, the court felt that they should be reinstated, particularly because the majority of

³⁵³ *AMCU and Others v Australian Laboratory Services (Pty) Ltd (JS315/12) [2017] ZALCJHB 398, at para 55.*

³⁵⁴ The Code of Good Practice: Dismissal. See also Mawasha op cit (n37)25.

³⁵⁵ *Mzeku* supra (n168) at 15.

³⁵⁶ *Atlantis Forge (Pty) Ltd* supra (n350) at 119.

participants in the strike received final written warnings and this suggested that the strike did not render the continuation of the employment relationship intolerable.³⁵⁷

The brief discussion of the above cases suggest that employers should not hastily dismiss employees for participating in an unprotected strike.³⁵⁸ It is also apparent that employers cannot exercise the provisions of section 68(5) of the LRA that is, dismissing employees for participating in an unprotected strike without a risk of them being reinstated or compensated by the CCMA or the courts.³⁵⁹ This does not suggest that employees should ignore procedural requirements for protected strikes, simply because these institutions may be lenient on them. It should be accepted that employees who participate in an unprotected strike are exposed to adverse consequences which may include dismissal.³⁶⁰

In addition to the substantive fairness requirements in terms of item 6(1) of the Code above, the Code requires that when confronted with an unprotected strike, the employer should follow the procedures set out in item 6(2) of the Code.³⁶¹ Item 6(2) of the Code states:

“Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them.”³⁶²

³⁵⁷ *Atlantis Forge (Pty) Ltd* supra (n350) at 119. See also Mawasha op cit (n34)25.

³⁵⁸ *SACCAWU on behalf of Mokebe & others v Pick n Pay Retailers (2018) 39 ILJ 201 (LAC)* at para 65.

³⁵⁹ Mawasha op cit (n37)26.

³⁶⁰ Mawasha op cit (n37)28.

³⁶¹ *Transport & General Workers Union & Others v Coin Security Group (Pty) Ltd* (2001) 22 ILJ 968 (LC) at 979E. See also Mawasha op cit (n37)6.

³⁶² Code of Good Practice: Dismissal.

The main reason for contacting a trade union is to discuss the course of action the employer intends adopting with the trade union's inputs.³⁶³ This is suitable where the employees embarking on the strike are trade union members and the union has placed a demand on the table for the employer's consideration.³⁶⁴ Even if there is no demand or the employees are not members of a union but there is an active union in the workplace, consulting with the trade union may be helpful. However, the Code does not contemplate the situation where the striking employees are not union members or the union holds no sway. Presumably then, the employer should consult with the employees' or their identified representatives directly. Another important reason associated with contacting the union officials is to grant the trade union the opportunity to persuade the striking employees to return to work in an event of an unprotected strike before the employer dismisses their members.³⁶⁵ The consultation with the trade union may also serve as a pre-dismissal hearing but it is not to give the trade union the opportunity to delay with persuading their members to return to work, thereby placing greater pressure on the employer to accede to their or its demands.³⁶⁶

Another requirement in terms of item 6(2) of the Code is that the employer issues an ultimatum that is clear and unambiguous before unprotected strikers may be dismissed.³⁶⁷ At Nkomati it was common cause that no written ultimatums were issued by management to employees. Verbal ultimatums were given to employees but Nkomati had no intentions to dismiss the strikers. Therefore the author will not discuss ultimatums in detail.

In *Mndebele and Others v Xstrata South Africa (Pty) Ltd t/a Xstrata Alloys* (Rustenburg Plant) the court held that:

'the code does not suggest how the ultimatum should be distributed, or require that it must be in writing. It states furthermore, that the issuing of an ultimatum is

³⁶³ Mawasha op cit (n37)26.

³⁶⁴ Mawasha op cit (n37)26.

³⁶⁵ Grogan op cit (n113)566.

³⁶⁶ Mawasha op cit (n37)26.

³⁶⁷ Mawasha op cit (n37)26.

not an invariable requirement. The purpose of an ultimatum is not to elicit any information or explanations from the employees but to give them an opportunity to reflect on their conduct, digest issues and if need be, seek advice before making the decision whether to heed the ultimatum or not. The ultimatum must be issued with the sole purpose of enticing the employees to return to work, and should in clear terms warn the employees of the folly of their conduct and that should they not desist from their conduct they face dismissal. Because an ultimatum is akin to a final warning, the purpose of which is to provide for a cooling-off period before a final decision to dismiss is taken, the *audi* rule must be observed both before an ultimatum is issued and after it has expired.¹³ In each instance, the hearing may be collective in nature and need not be formal.³⁶⁸

Furthermore, in *Transport and Allied Workers Union of South Africa obo MW Ngedle and 93 Others v Unitrans Fuel and Chemical (Pty) Limited*, the court confirmed that a dismissal was the appropriate sanction, in instances where an employer had issued a clear ultimatum informing workers engaged in an unprotected strike, that the misconduct would result in dismissal.³⁶⁹ Sometimes employees during strikes commit misconduct. Dismissal for misconduct will be discussed in the section that follows.

3.2.4.4 Dismissal for misconduct

3.2.4.4.1 Intimidation

The intimidation that occurs during strike action seems to usually be directed towards the non-striking employees, management and scab labour by the striking employees.³⁷⁰ This could be a way of showing their unhappiness towards the non-striking employees for not acting in solidarity with them by joining the strike.³⁷¹ At Nkomati one of the strikers namely

³⁶⁸ *Mndebele and Others v Xstrata South Africa (Pty) Ltd t/a Xstrata Alloys*, (JA57/12) [2016] (LAC) at para 27.

³⁶⁹ *Ngedle* supra (n131) at 50.

³⁷⁰ *Mbona* op cit (n1)39.

³⁷¹ *Mbona* op cit (n1)39.

Sibusiso Maseko, was charged and found guilty of intimidation which led to his dismissal. At Nkomati, strikers intimidated the grader operator despite the fact that intimidation is unlawful. Intimidation is a criminal offence, thus an employer can press criminal charges against the employees who commit the offence,³⁷² in addition to charging them with misconduct in terms of the disciplinary code and procedure or the Code of Good Practice.³⁷³

Nkomati pressed criminal charges of public violence and not of intimidation against some strikers. The courts have shown leniency in dealing with employees who participate in an unprotected strike due to intimidation. For example, 'in *SATAWU v Maxi Strategic Alliance (Pty) Ltd*, a group of non- striking employees mainly on night shift were intimidated into joining the strike by another group of employees who had voluntarily embarked on the strike.'³⁷⁴ The employer dismissed the voluntary strikers but gave those employees who were intimidated to participate in the strike final written warnings, as those employees were not willingly embarking in the strike and therefore found them less culpable.³⁷⁵ The court found that the dismissals of those employees who willingly participated in the strike were fair and that the employer was not inconsistent.³⁷⁶

3.2.4.4.2 Destruction to property

Employees are required to respect not only the authority of their employers, but also their property.³⁷⁷ Destruction to property is the unlawful and intentional damage to the property of another person.³⁷⁸ Often in the employment context strikers damage the employer's

³⁷² Mbona op cit (n1)40.

³⁷³ Gericke SB 'Revisiting the Liability of Trade Unions and/or their Members during Strikes: Lessons to be Learnt from Case Law' (2012) 75 *THRHR* 574.

³⁷⁴ *SATAWU and Others v Maxi Strategic Alliance (Pty) Ltd (JS)* [2008 ZALC 217 at para 20.

³⁷⁵ *Maxi Strategic Alliance* supra (n374) at 20.

³⁷⁶ The court in *Maxi Strategic Alliance* supra (n374) at 10 held as follows "As regards the first category and third category workers, their dismissal was not harsh because they had a reasonable opportunity to return to work. They had an opportunity to get advice from SATAWU. They were belligerent and uncooperative. They abandoned their right to the disciplinary hearings and to the appeal. The court sees no reason to interfere in Maxi's decision to dismiss them." See also Mbona op cit (n1)40.

³⁷⁷ Grogan op cit (n113)226.

³⁷⁸ Mbona op cit (n1)38.

property.³⁷⁹ The damaging of the employer's property by strikers could be the way of expressing their frustration and unhappiness towards their employer, and an attempt to set their employer back financially since the damaged property needs to be fixed or replaced.³⁸⁰

The destruction of property may happen if the employees believe that the employer is mostly concerned about its own economic interests and less about the employees' interests.³⁸¹ Damage to the employer's production property could result in a decrease in production.³⁸² It may also lead to the shutting down of the workplace for a certain period of time whilst the damage is being fixed or mitigated, which could have an adverse impact on the employer's productivity and/or profitability.³⁸³

As earlier mentioned, at Nkomati the strikers damaged company property. During the strike action the strikers started to stone the strike control room building and break its windows. The strikers further attempted to breakdown the doors by throwing stones and setting the strike control room building alight.

As the strikers moved through the plant they accordingly damaged windows of the offices, damaged cables and managed to shut down the MMZ and PCMZ plants. The shutting down of both MMZ and PCMZ plants had an adverse impact on Nkomati.

Item 3(4) of the Code, states that it is serious misconduct to willfully damage the property of the employer, that serious misconduct may justify dismissal.³⁸⁴ 'Similarly malicious damage caused to the property of third parties such as those businesses that are in the close vicinity with the strikers may qualify as serious misconduct.'³⁸⁵ Often those businesses have no link with the employer of the striking employees and such conduct constitutes criminal conduct too.³⁸⁶ Accordingly, Nkomati pressed criminal charges

³⁷⁹ Mbona op cit (n1)38.

³⁸⁰ Mbona op cit (n1)38.

³⁸¹ Mbona op cit (n1)38.

³⁸² Mbona op cit (n1)38.

³⁸³ Mbona op cit (n1)39.

³⁸⁴ See also Mohale op cit (n23)59. See also Code of Good Practice: Dismissal.

³⁸⁵ Mohale op cit (n23)59.

³⁸⁶ Mohale op cit (n23)59.

against individual employees for malicious damage to property and arson. These individuals were arrested and were later released on bail.

In addition to this, one of the employees drained chemicals from two tanks into the ground and causing financial loss. The chemical is known as a depressant. A depressant is a reagent used in the plant to separate waste from useful minerals. Without a depressant, minerals will be contaminated and would be invaluable, causing financial loss as a result. The employer would have to purchase more depressant chemicals. Another nine employees were charged and found guilty of damaging and burning company property. Since damage to property is a criminal offence, an employer can press criminal charges against the employees who commit the offence, in addition to charging the employees with misconduct in terms of the disciplinary code and procedure or the Code if there is no disciplinary code and procedure.³⁸⁷

3.2.4.4.3 Assault

Although incidents of assault were never reported at Nkomati, it is necessary to discuss this, as assaults incidents are common during unprotected strikes.

Assault is an unlawful and intentional application of force to a person.³⁸⁸ Assault is prevalent during strikes, often directed towards the non-striking employees and replacement labour.³⁸⁹ Strikers usually see the non-strikers as 'free-riders' who will benefit at their expense. This angers some strikers because employers are unlikely to accede to their demands when productivity and/or the business is not negatively affected.³⁹⁰ The longer the employer takes to accede to the strikers' demands, the more employees lose their wages and become angered.³⁹¹ Often strikers tend to believe assaulting non-strikers and replacement labour is justifiable because they believe there should be workers' solidarity. Employees who engage in such criminal conduct during strikes do so at their

³⁸⁷ Mbona op cit (n1)39.

³⁸⁸ Mbona op cit (n1)40.

³⁸⁹ Botha MM and Lephoto M 'An Employer's Recourse to Lock-Out and Replacement Labour: An Evaluation of Recent Case Law' *PER / PELJ* 2017(20) 25.

³⁹⁰ Botha and Lephoto op cit (n389)24.

³⁹¹ Botha and Lephoto op cit (n389)24.

own peril.³⁹² According to item 3(4) of the Code, physical assault on the employer, colleagues, clients, or customers, constitutes serious misconduct.³⁹³ As stated earlier serious misconduct may justify dismissal, however the employer is still required to follow guidelines in accordance with items 4 and 7 of the Code to ensure compliance with both procedural and substantive fairness.³⁹⁴

Regrettably, some employees (during strikes) tend to overlook the fact that common assault is a criminal offence even if it happens during strikes.³⁹⁵ An employer and assaulted employees, can lay criminal charges against the employees who commit the offence.³⁹⁶ Employers are generally hesitant to press criminal charges as it may be difficult to identify employees who committed assault or any criminal act during the strike.³⁹⁷ The employees are seldom prepared to assist the employer to identify the perpetrators and bring them to book.³⁹⁸ Perhaps with fear of being called 'sell outs' by other fellow employees. This conduct by employees for failing to assist the employer to bring the guilty to book introduces another issue - collective misconduct.

³⁹² Mohale op cit (n23)60.

³⁹³ The Code of Good Practice: Dismissal. See also Mohale op cit (n21)60.

³⁹⁴ The Code of Good Practice: Dismissal.

³⁹⁵ *Tsogo Sun Casinos* supra (n25) at para 4.

³⁹⁶ Tenza op cit (n3)122. See also Mbona op cit (n1)40.

³⁹⁷ Tenza op cit (n3)1. See also Mbona op cit (n1)41.

³⁹⁸ Tenza op cit (n3)47. See also Mbona op cit (n1)43.

3.2.4.4.4 Collective Misconduct

3.2.4.4.4.1 Common-purpose

The common purpose doctrine derives from criminal law and holds that, 'where two or more people associate together in order to commit a crime, they will each be liable for the criminal conduct of the other(s), which falls within their common design.'³⁹⁹ The wrongful or unlawful conduct of each person in such a case is viewed as an act committed by others as well; with a common purpose to commit the crime.⁴⁰⁰ Regardless whether the crime or unlawful act was ultimately executed by one person.⁴⁰¹ It is not necessary to show that each party performed a specific act towards the attainment of the joint object or contributed causally to the outcome, association in the common design renders the act of the principal offenders the act of all.⁴⁰² Common purpose must still be proved; there must be evidence to show that all the accused employees actively associated themselves with the conduct of the principal offenders.⁴⁰³

On occasion, the common purpose doctrine has been applied to justify dismissing groups of employees, where they have been found to have associated with one another in the commission of an act (or acts) amounting to misconduct. In *NSGAWU v Coin Security* the employer had dismissed 74 employees for unlawful conduct during a strike applying the doctrine of common purpose.⁴⁰⁴ The court had this to say about the common purpose doctrine, the court warned that the common purpose doctrine should not be used for imposing collective punishment or be confused with the concept of collective guilt.⁴⁰⁵ The court further stated that common purpose must still be proven and that the mere fact that all the dismissed employees were participating in the strike was not sufficient to draw an inference that all of them associated with few who committed unlawful acts.⁴⁰⁶

³⁹⁹ Mbona op cit (n1)45.

⁴⁰⁰ Mbona op cit (n1)45.

⁴⁰¹ Mbona op cit (n1)45.

⁴⁰² <https://tonyhealy.co.za › the-doctrine-of-common-purpose-and-the-workplace>. See also Grogan op cit (n110) 334.

⁴⁰³ Healy op cit (n402). See also Mohale op cit (n23)62.

⁴⁰⁴ Grogan op cit (n113)334.

⁴⁰⁵ *NSGAWU v Coin Security* 1997 1 BLLR 85 (IC) at 90F-G

⁴⁰⁶ *Coin Security supra* (n405) at 90F-G.

Clarifying the distinction between the interrelated collective misconduct terms, namely common purpose and derivative misconduct, is vital, particularly because when common purpose doctrine cannot be established, derivative misconduct may be.⁴⁰⁷ The following section will discuss the notion of derivative misconduct.

3.2.4.4.2 Derivative misconduct

As discussed earlier, company property such as cars, buildings and a grader were damaged and burned down at Nkomati. Nkomati could not identify all the perpetrators of these actions as some of the incidents took place at night. The video footage could not assist management to identify all the culprits. Management was only able to identify 14 employees who committed misconduct during the day when the video footage was clearer. As a result management requested employees to assist with the identification of the culprits without success.

It is accepted that the principle of derivative misconduct may be relied upon by employers where there is no direct evidence against the real culprits to enable the employer to charge those culprits for misconduct.⁴⁰⁸ The court in *Council for Scientific & Industrial Research v Fijen* explained derivative misconduct as follows: it involves a derived justification, arising from an employee's failure to offer reasonable assistance in identifying those who are actually responsible for the misconduct. Even if the dismissal is designed to target the perpetrators of the original misconduct, the justification is wide enough to include those innocent employees for being silent about the misconduct committed by others. Their silence make them guilty of a derivative violation of trust and confidence.⁴⁰⁹

⁴⁰⁷ Maloka TC 'Derivative Misconduct and Forms thereof: *Western Refinery Ltd v Hlebela* 2015 36 ILJ 2280 (LAC)' *PER / PELJ* 2016(19) 4.

⁴⁰⁸ Grogan op cit (n113) 331-332.

⁴⁰⁹ *Council for Scientific & Industrial Research v Fijen* (1996) 17 ILJ 18 (A) at 26 D-E.

The significance of the point that persons guilty of derivative misconduct are not actual perpetrators must be emphasised.⁴¹⁰

The origin of the concept of derivative misconduct and its introduction into the South African labour law derives from the case of *Chauke v Leeson Motors (Chauke)*.⁴¹¹ The court asked: "Where misconduct necessitating disciplinary action is proved, but management is unable to pinpoint the perpetrator or perpetrators, in what circumstances will it be permissible to dismiss a group of workers which incontestably includes them?"⁴¹² In *Chauke*, the primary issue was the positive identification of the culprits who committed several acts of sabotage in the employer's business.⁴¹³ The management of the business could not pinpoint the perpetrators.⁴¹⁴ A request to other employees to divulge the relevant information to management in order to avoid further sabotage drew no response.⁴¹⁵ Finally, the employer issued an ultimatum, specifying that any further sabotage to the business in respect of which the individual perpetrators remained unidentified would result in the dismissal of all employees.⁴¹⁶ Ultimately, with no positive response from employees, the entire workforce was dismissed.⁴¹⁷ The dismissal was held to be fair.⁴¹⁸

In the recent *Dunlop* case, the employer required the help of NUMSA in identifying the individuals who took part in the violence, and to prevent the violence. This bore no fruit. Eventually the employees were dismissed, some listed as culprits of violence and other individuals on the basis of derivative misconduct.⁴¹⁹

⁴¹⁰ *National Union of Metalworkers of South Africa (NUMSA) obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Ltd and Others* (2018) 39 ILJ 2226 (LAC) at para 24.

⁴¹¹ *Chauke v Leeson Motors* 1998 19 ILJ 1441 (LAC). See also Maloka op cit (n407)4.

⁴¹² *Leeson Motors* supra (n411) at 27.

⁴¹³ Maloka op cit (n407)4.

⁴¹⁴ Maloka op cit (n407)4.

⁴¹⁵ Maloka op cit (n407)4.

⁴¹⁶ Maloka op cit (n407)5.

⁴¹⁷ Maloka op cit (n407)5.

⁴¹⁸ Maloka op cit (n407)5.

⁴¹⁹ *Dunlop CC 2019* supra (n265) at 13.

In the Dunlop case the constitutional court held a different position from the developed precedence on derivative misconduct. The constitutional court diverted from some of the previous case law and stated that in the context of a strike, an employer's reciprocal duty of good faith would require, at the very least, that employees' safety should be guaranteed before expecting them to come forward and disclose information or exonerate themselves.⁴²⁰ Derivative misconduct is still available to employers, but the Dunlop constitutional court decision implies that, as much as the employee has a duty to assist the employer, it should be reciprocal: the employer also has a duty to ensure the safety of employees who assist the employer to identify the culprits.⁴²¹

The constitutional court further held that to 'impose a unilateral obligation on an employee to disclose information to the employer about the participation of a co-employee in misconduct in a protected strike would be similar to imposing a fiduciary duty on the employee. In the context of a strike, the imposition of a unilateral duty to disclose would undermine the collective bargaining power of workers, without any concomitant obligation on the part of the employer to give something reciprocally similar to the workers.'⁴²² The constitutional court went on to say that to expect employees to be their employer's keeper in the context of a strike where worker solidarity plays an important role in the power play between worker and employer would be asking too much without some reciprocal obligation on an employer's part.⁴²³

⁴²⁰ *Dunlop CC 2019 supra* (n265) at 76.

⁴²¹ *Dunlop CC 2019 supra* (n265) at 76.

⁴²² *Dunlop CC 2019 supra* (n265) at 73.

⁴²³ *Dunlop CC 2019 supra* (n265) at 72.

3.2.4.4.5 Applying Collective Misconduct principles to Nkomati.

These principles are not without practical challenges. How does the employer prove that employees associated with others to commit a crime or serious misconduct during a strike when the employer cannot even reliably identify the individuals? For instance, at Nkomati approximately 150 employees participated in the unprotected strike, however only 14 perpetrators were identified by their superiors. Employees were urged to assist the employer to identify other perpetrators to no avail. In terms of the derivative misconduct principle, Nkomati was in the position to dismiss other employees for failing to assist the employer to bring the guilty to book. The practical challenges to this approach is that, in addition to mining, Nkomati runs sophisticated CWP, MMZ and PCMZ plants, and therefore dismissing approximately 150 unprotected strikers would be self-destructing. Employees operating the plants and the laboratory would not readily be available in the market. Replacing the dismissed strikers would be a challenge especially with the current adverse economic conditions facing the mining industry. Training approximately 150 new employees would place a severe financial burden on Nkomati. These plants are continuous operation plants, and they are designed to run continuously for 24 hours. It would be extremely burdensome to ensure efficiency after dismissing all of these employees for derivative misconduct. Nkomati also has a duty to ensure the safety of employees who assist the employer to identify the culprits. But how would the employer ensure the safety of those employees who assisted it outside of the workplace?

In conclusion the constitutional court in the *Dunlop* decision, implies that, as much as the employee has a duty to assist the employer, it should be reciprocal; the employer therefore also has a duty to ensure the safety of employees who assist the employer to identify the culprits. Without a reciprocal duty from the employer, the employer cannot rely on the derivative misconduct doctrine. It remains to be seen however, how the safety of employees will be guaranteed by employers after being assisted by some employees to identify the culprits. Employees live together in communities (particularly in the mining areas) and it is unlikely that the employer's protection can extend beyond the workplace.

It also remains to be seen how the courts will deal with this new development in the derivative misconduct doctrine.

In addition to the above remedies Nkomati may claim damages against the trade union or employees for losses suffered as a result of the unprotected strike. Unfortunately Nkomati did not claim damages for losses suffered during the strike.

3.3. Conclusion

Every action has consequences. Employees lost their jobs at Nkomati due to their actions and others received final warnings for participating in the unprotected strike.⁴²⁴ Once employees decide to embark on any form of a strike whether protected or not, they should be mindful from the beginning that their action shall be followed by consequences, potentially including disciplinary proceedings and possibly even litigation.⁴²⁵ If the protected strike is peaceful, they will lose their wages because employers more often than not apply the principle of no work no pay. The employer may also dismiss employees for reasons based on operational requirements.⁴²⁶ Without any doubt a strike will harm an employer, due to the loss of productivity or business.⁴²⁷ Whether the strike is protected or unprotected, if it is marred by intimidation and the destruction of company property the consequences may be more severe than just losing daily wages.⁴²⁸ It is therefore very important for employees to ascertain the status of their strike before they commence the action and refrain from committing any unlawful activities during the strike.⁴²⁹

⁴²⁴ Mawasha op cit (n37)28.

⁴²⁵ Mawasha op cit (n37)28.

⁴²⁶ Section 67(5) of the LRA.

⁴²⁷ The Code for Collective Bargaining item 16.

⁴²⁸ *Dunlop CC 2019 supra* (n265) at 3, *the court reiterated that* “an employer is not precluded from fairly dismissing an employee in terms of the LRA for a reason related to the employee’s misconduct during a strike.”

⁴²⁹ Mawasha op cit (n37)28.

Chapter 4

CONCLUSION AND RECOMMENDATIONS

4.1 Conclusion

Strikes remain an important weapon for workers notwithstanding that they may have adverse consequences for both parties to the employment relationship.⁴³⁰ The stoppage in the production line may cause enormous loss to the employer. The withdrawal of labour may sometimes affect other sectors, organizations or persons too. For instance, if truck drivers' strike, the retail sector, petroleum, manufacturing and other sectors may be affected. The strikers are also losing their daily wages for services not rendered. In addition any loss to the employer may affect them directly or indirectly. For instance if the employer loses a big client due to the strike, the employer may be compelled to reduce labour due to the reduction of work. Section 67(5) LRA provides that the employer is not precluded from dismissing employees based on operational requirements.⁴³¹

At Nkomati the employment relationship environment is negatively affected by strikes which take place almost every year and are sometimes violent.⁴³² Strikes in South Africa are frequently violent, more so on the picketing line.⁴³³

The use of violence to express concerns has a long history in South Africa.⁴³⁴ Violence is still prevalent in the South African society today as it was before the birth of our democracy.⁴³⁵ Violence played a vital role in defeating the government policy of racial discrimination.⁴³⁶ Today we have a new democratic dispensation, with the rule of law

⁴³⁰ Gcume op cit (n21)26.

⁴³¹ Section 67(5) of the LRA.

⁴³² Mnyandu SN Circumventing another Marikana Massacre: A look into the provisions of the Labour Relations Amendment Act relating to the limitation on the right to strike (LLM dissertation, University of KwaZulu-Natal, 2015) 10.

⁴³³ Tenza op cit (n3)164

⁴³⁴ Williams G 'Social dynamics transformation: critical perspectives on Southern Africa' 1988 14(1) Journal of African Studies 57. Also see Tenza op cit (n3)289.

⁴³⁵ Tenza op cit (n3)289.

⁴³⁶ Tenza op cit (n3)289.

prevailing to guard against unlawfulness.⁴³⁷ With this new era parties in the employment relationship should refrain from resorting to violence when resolving their differences.⁴³⁸ The very purpose of the LRA is to ensure that industrial conflict is regulated within the parameters of law, which includes adherence to the criminal law.⁴³⁹

The new democratic dispensation resulted in the adoption of the Constitution of the Republic of South Africa in 1996 which has drastically changed the labour relations arena.⁴⁴⁰ The Bill of Rights in the South African Constitution provides workers with the right to strike.⁴⁴¹ The right to strike is given effect by the LRA.⁴⁴²

Ideally the constitutional right to strike should not negatively affect the constitutional rights of others through using means that are not peaceful and commit criminal activities to force the employer to accede to their demands.⁴⁴³ This study acknowledges that the LRA does not guarantee a peaceful strike, but criminal activities are now a common feature during strikes in the South Africa as we have also seen at Nkomati.

If there is a dispute between a trade union and/or employees with their employer, resulting into a strike action it is more probable that violence and other unlawful conduct may be committed.⁴⁴⁴ There have been several instances where workers have caused violence during strikes resulting in people getting injured or killed and damage to property.⁴⁴⁵

The frustration of workers that the employer will continue with its production and generate profit as normal without feeling the economic harm from the strike also causes

⁴³⁷ Tenza op cit (n3)289.

⁴³⁸ Tenza op cit (n3)289.

⁴³⁹ *AMCU and Others v KPM Road and Earthworks (Pty) Ltd* (2019) 40 ILJ 297 (LAC) at para 19.

⁴⁴⁰ Tenza op cit (n3)289.

⁴⁴¹ Section 23(2)(c) of the Constitution.

⁴⁴² Section 64 of the LRA.

⁴⁴³ *FAWU on behalf of Kapesi and Others v Premier Foods Ltd t/a Blue Ribbon Salt River* (2010) 31 ILJ 1654 (LC) at para 6. See also Gcume op cit (n21)11.

⁴⁴⁴ Tenza op cit (n3)290.

⁴⁴⁵ *SATAWU v Garvis & others* (007/11) [2011] ZASCA 152 at para 20. See also Tenza op cit (n3) 290.

disharmony between striking and non-striking employees.⁴⁴⁶ This may happen where a strike enjoys little support, as was seen by the intimidation of some employees at Nkomati.⁴⁴⁷

More often unlawful activities erupt from unprotected strikes, as these type of strikes usually happen suddenly without any warning, as a result trade union leadership do not have the opportunity to arrange marshals to control the strike and ensure that unlawful activities are not committed to avoid any form of liability as a trade union.⁴⁴⁸

In terms of the provisions of the LRA, the trade union and employees will be liable for damages attributable to a strike or conduct in contemplation or in furtherance of a strike that does not comply with the procedural requirements.⁴⁴⁹ They may equally be liable for violence or other unlawful acts committed during a strike. An interdict can be used to prohibit unlawful activities during strikes too.⁴⁵⁰ Interdicts are court orders and they are therefore supposed to be respected by employers, trade unions and their members.⁴⁵¹ Employers and trade unions need to be reminded that failure to obey an interdict is a total disregard of the rule of law and they may be guilty of contempt.⁴⁵²

The primary objective of strikes is to cause disruptions to the employer and the study accepts that strikes cannot totally be disallowed as they remain an important weapon in the hands of employees for effective collective bargaining in South Africa.⁴⁵³ At Nkomati and other workplaces, protected strikes remain the legitimate vehicle for workers to express themselves on issues that affect them.⁴⁵⁴ Strikes currently do and will therefore

⁴⁴⁶ Tenza op cit (n3)290.

⁴⁴⁷ Tenza op cit (n3)290.

⁴⁴⁸ Mawasha op cit (n37)8.

⁴⁴⁹ Section 68(1)(b) of the LRA .See also Tenza op cit (n3)291.

⁴⁵⁰ Rycroft op cit (n26) 203.

⁴⁵¹ Tenza op cit (n3)291.

⁴⁵² Botha and Germishuys op cit (n214)546. See also Tenza op cit (n3)291.

⁴⁵³ Tenza op cit (n3)294.

⁴⁵⁴ *SATAWU v Garvas* (2012) 33 *ILJ* 1593 (CC) at 1610G.

continue to play a very important role in collective bargaining in the South African labour relations system.

4.2 Recommendations

In the search for solutions, this dissertation critically outlined the legal framework regulating strikes. It was found that the framework does not make provision for union officials to make sufficient reasonable attempts to end unprotected strikes embarked upon by their members. Item 6(2) of the Code of Good Practice on Dismissal in Schedule 8 of the LRA (the Code) is not a sufficient guideline in terms of addressing the issue. Item 6(2) of the Code provides that “prior to dismissal the employer should, at the earliest opportunity, contact the trade union official to discuss the course of action it intends to adopt.” A union official may just come to the employer premises and not put reasonable attempts to dissuade his or her members from continuing with the unprotected strike.

The visit to the employer must be meaningful with a commitment to dissuade members from their unprotected strike and/or unlawful conduct. Reverting to the Nkomati event, the Regional Office Bearer spent approximately 20 minutes with the strikers, which the author believes was not sufficient time to persuade their members to end the unprotected strike. It is time for trade unions to accept responsibility for their actions and that of their members by putting more efforts to discourage unlawful activities.⁴⁵⁵ The author further believes Nkomati should follow the position of the court in *Mangaung Local Municipality v SAMWU* where the court took into account the fact that the trade union failed to discharge its responsibilities in terms of item 6 of the Code.⁴⁵⁶ Item 6 of the Code provides that where employees are engaged in an unprotected strike and when the employer is trying to get employees to return to work, the employer is required to solicit assistance from trade union officials to discuss the proposed course of action.⁴⁵⁷ The trade union official or trade union representative is expected to make use of this opportunity to

⁴⁵⁵ Tenza op cit (n3)295.

⁴⁵⁶ Tenza op cit (n3)118.

⁴⁵⁷ Tenza op cit (n3)119.

discourage the conduct of its members and encourage them to return to work.⁴⁵⁸ Where the trade union fails to discharge this responsibility, the liability to compensate the employer, arises.⁴⁵⁹

This position was further illustrated in *Association of Mineworkers and Construction and Others v KPMM Road and Earthworks (Pty) Ltd*, where the court held that the 'trade union had not acted reasonably or taken reasonable steps to guard against the unlawful conduct of employees. The court found that the union needed to act reasonably by proactively intervening where transgressions by its members occur, and ensuring it had marshals to monitor the conduct of its members. Only in these circumstances can the trade union claim that it took reasonable measures within its power to deter actions of their members.'⁴⁶⁰

The author believes that the trade union office bearer at Nkomati did not sufficiently discharge his duties to persuade the striking employees to return to work and not to commit unlawful conduct. He also did not take reasonable measures to deter the actions of the trade union's members; he left the shop stewards with a responsibility to exercise control over unruly employees despite being aware that he was specifically called to assist the employer because the shop stewards had already lost control of their members.

The author recommends that item 6(2) of the Code be supplemented by incorporating the decisions of the judgments above that require a union official to take sufficiently reasonable steps to encourage employees to return to work during unprotected strikes and to take steps to guard against criminal conduct.

Trade union members at Nkomati have a propensity to embark on unprotected strikes almost every year, particularly once the validity of their final warnings have expired. In deterring this conduct, the author suggests that the current disciplinary code and

⁴⁵⁸ Tenza op cit (n3)119.

⁴⁵⁹ *Mangaung Local Municipality v SAMWU* (2003) 24 ILJ 405 (LC) at para 47. See also Tenza op cit (n3)119.

⁴⁶⁰ *KPMM Road and Earthworks (Pty) Ltd* supra (n439) at 15.

procedure that provides that a final warning for an unprotected strike is valid for 12 months, should be amended and thus be extended to 24 months or more. The author also suggests that Nkomati and the relevant trade union conclude a collective agreement which prohibits short term incentive bonus related strikes and agree on compulsory arbitration for any disputes arising on the issue, as provided for by section 65(1)(b) of the LRA.⁴⁶¹

As mentioned earlier Nkomati has also experienced incidents of destruction of property and intimidation. In order to deter these types of conduct, in their collective agreement parties must further agree to abide by all the rules agreed upon in their collective agreement denouncing such misconduct during strikes. It is additionally recommended that the said collective agreement must use the framework as provided for in the Code of Good Practice: Collective Bargaining, Industrial Action and Picketing (the Code for Collective Bargaining).⁴⁶²

It is recommended that the trade union should conduct a secret ballot before calling employees to strike. As mentioned, the National Union of Mineworkers (NUM) is the only trade union at Nkomati and its constitution provides for a ballot before embarking in a strike.⁴⁶³ At this juncture NUM's constitution does not provide for a recorded and secret ballot to be held prior to a strike in terms of section 95(5)(p) of the LRA.⁴⁶⁴ This suggest that the NUM must amend its constitution to comply with the requirements of the law. The Code for Collective Bargaining currently stipulate that "registered trade unions are obliged to comply with their constitutions even though the failure to do so does not have the consequence of invalidating the protected status of the strike."⁴⁶⁵

⁴⁶¹ The LRA.

⁴⁶² The Code for Collective Bargaining item 16.

⁴⁶³ The Constitution of the NUM op cit (n193).

⁴⁶⁴ The LRA.

⁴⁶⁵ The Code for Collective Bargaining item 19(3).

One of the primary objectives of the secret ballot by trade union members is to deter violence during strikes.⁴⁶⁶ Thus balloting may bring peace and lawfulness during strikes. As discussed, strikes ideally, need to be peaceful even though this is only provided for in terms of picketing by the legislation.⁴⁶⁷

It is further recommended that both Nkomati and NUM follow the requirements outlined in the Code for Collective Bargaining which urge parties to develop rules regulating peaceful and protected strikes, including picketing.⁴⁶⁸

If these recommendations are adopted, the author submits that industrial action at Nkomati in future may well be peaceful resulting in a more peaceful environment there.⁴⁶⁹ The collective agreement will serve as a deterrent to trade unions and their members as the unions will take steps to prevent industrial action from degenerating into violence.⁴⁷⁰ The environment may be free of violence, intimidation and killings.⁴⁷¹ The author also submits that if a strike is peaceful, the value of a strike as a method of expression will be restored and civil claims are less likely to arise.⁴⁷² In addition, Nkomati will have less dismissals for misconduct committed during strikes. Thus, the trade union will not lose its membership due to dismissals on the basis of misconduct, while the assets of Nkomati are simultaneously protected.⁴⁷³

⁴⁶⁶ Tenza op cit (n3)291.

⁴⁶⁷ Section 69(1) of the LRA.

⁴⁶⁸ The Code for Collective Bargaining item 23(1).

⁴⁶⁹ Tenza op cit (n3)293.

⁴⁷⁰ Tenza op cit (n3)293.

⁴⁷¹ Tenza op cit (n3)293.

⁴⁷² Tenza op cit (n3)293.

⁴⁷³ Tenza op cit (n3)294.

A peaceful industrial action will be achieved if trade unions perform their obligation to educate their members about how to exercise their rights within the confines of the law.⁴⁷⁴ Section 17 of the constitution places an obligation on them to do so “*peacefully*” and “*unarmed*”.⁴⁷⁵

The author further submits that amending the current Nkomati disciplinary code and procedure, to provide for more severe sanction to employees for participating in an unprotected strike. This amendment to the disciplinary code and procedure may deter employees from striking without having followed the requirements of Chapter IV of the LRA.

In conclusion, the above recommendations urge trade unions to make reasonable and sufficient efforts to dissuade their members from participating in unprotected strikes and to discourage their members from committing any unlawful conduct during strikes. In addition Nkomati will have effective systems in a form of a collective agreement and disciplinary code and procedure to discourage unprotected strikes and unlawful activities during strikes.

⁴⁷⁴ Tenza op cit (n3)294.

⁴⁷⁵ *Xstrata South Africa (Pty) Ltd* supra (n336)36. See also Tenza op cit (n3) 294 and Tom op cit (n20)45.

Bibliography

Primary Sources

Cases

Algoa Bus Company v SATAWU & others [2010] 2 BLLR 149 (LC).

Algoa Bus Company v SATAWU and Others (2015) 36 ILJ 2292 (LC).

Association of Mineworkers and Construction and Others v KPMM Road and Earthworks (Pty) Ltd (2019) 40 ILJ 297 (LAC).

Association of Mineworkers and Construction Union ("AMCU") and Others v Australian Laboratory Services (Pty) Ltd (JS315/12) [2017] ZALCJHB 398.

Betafence South Africa (Pty) Ltd v NUMSA C194/2016.

BMW SA (Pty) Ltd v National Union of Metalworkers of SA on behalf of Members (2012) 33 ILJ 140 (LAC).

Ceramic Industries Ltd t/a Betta Sanitary ware and Another v National Construction Building and Allied Workers Union and Others [1997] 6 BLLR 697 (LAC).

Chauke v Leeson Motors 1998 19 ILJ 1441 (LAC).

Council for Scientific & Industrial Research v Fijen (1996) 17 ILJ 18 (A).

CWIU v Plascon Decorative (Inland) (Pty) Ltd [1998] 12 BLLR 1191 (LAC).

Fakie NO v CCII Systems (Pty) Ltd (2006) 4 SA 326 (SCA).

Food & Allied Workers Union on behalf of Kapesi and Others v Premier Foods Ltd t/a Blue Ribbon Salt River (2010) 31 ILJ 1654 (LC).

Food & Allied Workers Union and Others v Premier Foods Ltd t/a Blue Ribbon Salt River (C 722/2012) [2012] ZALCCT 36; [2012] 12 BLLR 1281 (LC); (2013) 34 ILJ 1171 (LC).

Food & Allied Workers Union on behalf of Kapesi v Premier Foods Ltd t/a Blue Ribbon Salt River 2012 33 ILJ 1779 (LAC).

Food and Allied Workers' Union and Others v La Visagie and Seun (JS831/13) [2017] ZALCJHB 288.

FAWU v In2Food (Pty) Ltd (2014) 35 ILJ 2767 (LAC).

Fose v Minister of Safety and Security (1997) 3 SA 786 (CC).

Gobile v BP Southern Africa (Pty) Ltd and Others (1999) 20 ILJ 2027 (LAC).

Growthpoint Properties Ltd v SA Commercial Catering & Allied Workers Union & others (2010) 31 ILJ 2539 (KZD).

Hotz and Others v University of Cape Town [2016] ZASCA 159; [2016] 4 All SA 723 (SCA); 2017 (2) SA 485 (SCA).

Leoni Wiring Systems (East London) (Pty) Ltd v National Union of Metalworkers of SA & other (2007) 28 ILJ 642 (LC).

Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd 1985 (1) SA 475 (A).

Mangaung Local Municipality v SAMWU (2003) 24 ILJ 405 (LC).

Mndebele and Others v Xstrata South Africa (Pty) Ltd t/a Xstrata Alloys, (JA57/12) [2016] (LAC).

Modibedi & others v Medupi Fabrication (Pty) Ltd (2014) 35 ILJ 3171 (LC).

Modise and Others v Steve's Spar Blackheath [2000] ZALAC 1; (2000) 21 ILJ 519 (LAC).

Mondi Ltd (Mondi Kraft Division) v Chemical Energy Printing Wood & Allied Workers Union & others (2005) 26 ILJ 1458 (LC).

Mzeku and Others v Volkswagen SA (Pty) Ltd and Others [2001] 8 BLLR 857 (LAC).

National Council of SPCA v Open shore 2008 (5) SA 339 SCA.

National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd 2016 37 ILJ 476 (LC).

National Union of Mineworkers obo Khumalo Sibusiso and 9 Others v Nkomati Joint Venture [2019] Case no: MP6005-18 (CCMA).

National Union of Metalworkers of South Africa (NUMSA) obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Ltd and Others (2018) 39 ILJ 2226 (LAC).

National Union of Metalworkers of South Africa obo Khanyile Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others [2019] ZACC.

National Union of Public Service & Allied Workers and Others v National Lotteries Board [2014] ZACC.

Ngedle and 93 Others v Unitrans Fuel and Chemical (Pty) Limited [2016] ZACC 28.

North West Star (Pty) Ltd (Under Judicial Management) v Serobatse (2005) 26 ILJ 56 (LAC).

NUMSA and Others v Atlantis Forge (Pty) Ltd (LC308/03) [2005] ZALC 13; [2005] 12 BLLR 1238 (LC).

Pikitup Johannesburg (Pty) Ltd (Pikitup) v South African Municipal Workers Union (SAMWU) and Others (J2362/15) [2016] ZALCJHB 149 (19 April 2016).

Platinum Mines Ltd v The Mouthpiece Workers Union (2002) 1 BLLR 84 (LC).

PTAWU obo Khoza v New Kleinfontein Goldmine (Pty) Ltd (2016) 37 ILJ 1728 (LC).

RAM Transport (SA) (Pty) Ltd v South African Transport Allied Workers Union (J106/2011) [2011] ZALCJHB 3; (2011) 32 ILJ 1722 (LC).

SACCAWU obo Mokebe and Others v Pick 'n Pay Retailers (JA36/16) [2017] ZALCJHB 345 (26 September 2017).

SACCAWU on behalf of Mokebe & others v Pick n Pay Retailers (2018) 39 ILJ 201 (LAC).

Schoeman v Samsung Electronics SA (Pty) Ltd [1997] 10 BLLR 1364 (LC) 1367.

South African Transport & Allied Workers Union v Garvis & others (007/11) [2011] ZASCA 152.

South African Transport & Allied Workers Union v Garvas (2012) 33 ILJ 1593 (CC).

South African Transport and Allied Workers Union and Others v Moloto NO and Another (2012) 33 ILJ 2549 (CC).

Security Services Employers' Organisation and Others v SA Transport and Allied Workers Union and Others (2007) 28ILJN1134 (LC).

South African Clothing and Textile workers Union and Others v Filtafelt (Pty) Ltd (JS263/15) [2017] ZALCJHB 483 (LC).

South African Commercial Catering and Allied Workers Union and Other v Check One (Pty) Ltd (D826/2009) [2012] ZALCD 3; (2012) 33 ILJ 1922 (LC).

South African Police Service v Police and Prisons Civil Rights Union and Others (J1444/2007) [2007] ZALC 44; [2007] 10 BLLR 978 (LC).

South African National Defence Union v Minister of Defence and Another [1999] ZACC 7; 1999 (4) SA 469 (CC)

South African Transport and Allied Workers Union and Others v Maxi Strategic Alliance (Pty) Ltd (JS) [2008 ZALC 217.

Stuttafords Department Stores Ltd v Southern African Clothing and Textile Workers Union (CA2/00) [2000] ZALAC 22 (2 November 2000).

Transport & General Workers Union & Others v Coin Security Group (Pty) Ltd (2001) 22 ILJ 968 (LC).

Transport and Allied Workers Union of South Africa obo MW Ngedle and 93 Others v Unitrans Fuel and Chemical (Pty) Limited [2016] ZACC 28.

Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union and Others (2012) 33 ILJ 998 (LC).

Vanachem Vanadium Products (Pty) Ltd v National Union Of Metalworkers Of SA and Others(J658/14) [2014] ZALCJHB 159; [2014] 9 BLLR 923 (LC).

VNR Steel (Pty) Ltd v NUMSA (1995) 16 ILJ 1483 (LAC).

Xstrata South Africa (Pty) Ltd v Association of Mineworkers and Construction Union and Others (J1239/13) [2014] ZALCJHB 58.

Statutes

The Constitution of the Republic of South Africa of 1996.

The Labour Relations Act 66 of 1995.

Code of Good Practice: Dismissal (Appendix to the *Labour Relations Act 66 of 1995*)

Code of Good Practice on Picketing (Appendix to the *Labour Relations Act 66 of 1995*)

The Code of Good Practice: Collective Bargaining, Industrial Action and Picketing
(Appendix to the *Labour Relations Act 66 of 1995*)

Secondary Sources

Books

S Bendix *Industrial Relations in South Africa* 5ed (2010).

D du Toit et al. *Comprehensive Guide to Labour Relations Law* 6ed (2015) Lexis Nexis.

J Grogan *Dismissal* 2ed (2014).

M Loubser et al. *The Law of Delict in South Africa: Private Law* 2ed (2012).

PS Nel et al. South African Employment Relations, Theory and Practice 8ed (2016).

R Venter and A Levy *Labour Relations in South Africa* 5ed (2014).

Journals

A Rycroft 'What Can Be Done about Strike-Related Violence?' (2014) 30 *IJCLLR* (*International Journal of Comparative Labour Law and Industrial Relations*) (2)199-216.

MM Botha and M Lephoto 'An Employer's Recourse to Lock-Out and Replacement Labour: An Evaluation of Recent Case Law' (2017) *PER / PELJ* (20) 2-25.

G Williams 'Social dynamics transformation: critical perspectives on Southern Africa' (1988) 14(1) *Journal of African Studies* 57.

SB Gericke 'Revisiting the Liability of Trade Unions and/or their Members during Strikes: Lessons to be Learnt from Case Law' (2012) 75 *THRHR* 566-585.

R Le Roux and T Cohen 'Understanding the Limitations to the Right to Strike in Essential and Public Services in the SADC Region' (2016) *PER / PELJ* (19) 2-19.

TC Maloka 'Derivative Misconduct and Forms thereof: *Western Refinery Ltd v Hlebela* 2015 36 *ILJ* 2280 (LAC)' (2016) *PER / PELJ* (19) 2-13.

KJ Selala 'The Right to Strike and the Future of Collective Bargaining in South Africa: An Exploratory Analysis' (2014) *International Journal of Social Sciences* (3) 115 -125.

Thesis

W Achmat W The right to strike and its limitations LLM (University of Pretoria, 2015).

OT Gcume Violence during industrial action: a critical analysis of recent case law masters of business law (University of KwaZulu-Natal, 2018).

CD Malebye The right to strike in respect of employment relationships and Collective Bargaining LLM (University of Pretoria, 2014).

MB Mawasha An analysis of legal implications for participating in an unprotected strike LLM (University of South Africa, 2013).

MD Mbona A critical analysis of the law on strikes in South Africa LLM (University of KwaZulu-Natal, 2014).

T Mohale A critical study of the legal framework regulating strikes and strike violence in South Africa LLM (University of KwaZulu-Natal, 2017).

SN Mnyandu Circumventing another Marikana Massacre: A look into the provisions of the Labour Relations Amendment Act relating to the limitation on the right to strike LLM (University of KwaZulu-Natal, 2015).

EM Tenza The liability of trade unions for conduct of their members during industrial action LLD (University of South Africa, 2016).

PY Tom A trade union's liability for damages caused during a strike: A critical evaluation of the Labour Relations Act and recent judgments Masters of Business Law (University of KwaZulu-Natal, 2014).

Articles

M Botha and W Germishuys 'The promotion of orderly collective bargaining and effective dispute resolution, the dynamic labour market and the powers of the Labour Court' (2017) 80 THRHR 531-552.

PAK le Roux 'Claims for compensation arising from strikes and lockouts' (2013) 23(2) *CLL* 11.

A Myburgh 'The failure to obey interdicts prohibiting strikes and violence (the implications for labour law and the rule of law)' (2013) 23 *CLL* 9.

International Charters, Conventions and Covenants

International Covenant on Economic, Social and Cultural Rights of 1996.

International Labour Organization Convention 87 of 1948.

Internet Sources

The right to strike and its limitations (LLM dissertation, University of Pretoria, 2015), available at [https://repository.up.ac.za › bitstream › handle › Achmat_Right_2016](https://repository.up.ac.za/bitstream/handle/Achmat_Right_2016). Accessed on 09/04/2019.

Unprotected strikes, available at <https://www.wylie.co.za/newsroom/unprotected-strikes-trevor-mchunu-employment-law/> Accessed on 09 April 2019.

GOBILE v BP SOUTHERN AFRICA (PTY) LTD & OTHERS. LABOUR APPEAL COURT (JA51/98), available at [https://heinonline.org › hol-cgi-bin › get_pdf › ijluta20](https://heinonline.org/hol-cgi-bin/get_pdf/ijluta20). Accessed on 31 October 2019.

The doctrine of common purpose, available at [https://tonyhealy.co.za › the-doctrine-of-common-purpose-and-the-workplace](https://tonyhealy.co.za/the-doctrine-of-common-purpose-and-the-workplace). Accessed on 31 October 2019.

<http://www.saflii.org/> Accessed on 21 October 2019.

https://www.iises.net/download/Soubory/IJOSS/V3N5-special/pp115-126_ijossV3N5.pdf. Accessed on 12 May 2019.

https://researchspace.ukzn.ac.za/bitstream/handle/10413/12361/Tom_Pumla_Yvette_2014.pdf? Accessed on 04/10/2019.

Constitutions

Constitution of the National Union of Mineworkers of 2011.